Supreme Court, U.S.
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No. 041643

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In The
Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether long-standing res judicata principles should be applied differently in a Title VII employment discrimination case so that a partial judgment by a federal court on some (but not all) federal claims in a prior lawsuit that was thereafter remanded to state court qualifies as a final judgment on the merits so as to bar a subsequent federal complaint filed after a right-to-sue letter was procured?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the earlier proceedings below were Edwin A. Rugg (personally and in his capacity as Vice-President of Academic Affairs, Kennesaw State University (KSU)), Timothy Mescon (individually and in his capacity as Dean of Coles College of Business at KSU), and Teresa J. Covin (personally and in her capacity as Chair of the Department of Management & Entrepreneurship at KSU). Mr. Mescon was later dismissed without prejudice from the suit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul D. Lapides, respectfully prays that a writ of certiorari issue to review the December 27, 2004, opinion and judgment of the U.S. Courts of Appeals for the Eleventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Lapides v. Board of Regents of the University System of Georgia*, No. 04-1261-H (11th Cir. Dec. 27, 2004), is unreported but is reprinted at App. 1a. The U.S. District Court's Order of March 24, 2004, is unreported but is reprinted at App. 7a. The District Court's Order approved and adopted a Report and Recommendation of a U.S. Magistrate as the judgment of the Court. The Report and Recommendation of February 13, 2004, is unreported but is reprinted at App. 12a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of December 27, 2004. The Eleventh Circuit denied Lapides' petitions for rehearing and for rehearing en banc on March 8, 2005. See App. 5a. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition raises questions about the proper scope of the res judicata doctrine as a ground for rejecting Title VII employment discrimination claims brought under 42 U.S.C. § 2000e-2 (2005).

STATEMENT

1. This is the second time this matter is before this Court. See *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002). Petitioner, Paul D. Lapides, is a professor at Kennesaw State University (KSU), part of the State University System of Georgia under its Board of Regents ("Regents"). Aggrieved because of various personnel actions taken against him by KSU administrators, Lapides brought suit in Superior Court of Cobb County, State of Georgia, on March 9, 2000, naming as defendants the Regents and three KSU administrators in both their personal and official capacities. See, *supra*, at (ii). Lapides' complaint sounded in common law tort, but also included an allegation that defendants had violated his constitutional due process rights. Chief among Lapides' complaints was that KSU officials encouraged a former student who had already graduated to file a false charge of sexual harassment against him, publicized the charges in violation of state and federal guidelines, and then retaliated against Lapides when he complained he was being treated unfairly because of his religion. Like five other professors, Lapides had complained about KSU's treatment, including, for example, conducting an unprecedented meeting among five administrators and another professor's student/lover to encourage her to file a criminal complaint against Lapides, using the criminal

complaint to justify denying Lapides' internal appeal, and then covering up their involvement in and the existence of the criminal complaint.

In the original, state court complaint, see App. 143a, filed because of the impending expiration of a statute of limitations on one of Lapides' state law claims, Lapides did not allege any causes of action under Title VII of the Civil Rights Act because he had not received a right-to-sue letter.

On April 13, 2000, attorneys for the State of Georgia filed two Answers in Cobb County Superior Court, one on behalf of the Regents and the other for the individual defendants. Both Answers asserted as an affirmative defense sovereign immunity and Georgia's Eleventh Amendment immunity. On the same day, Georgia's lawyers filed a Notice of Removal in the U.S. District Court for the Northern District of Georgia. See App. 2a. The Notice asserted a right of removal under 28 U.S.C. §§ 1441 & 1446, insofar as Lapides' complaint ostensibly sought recovery under 42 U.S.C. § 1983. With its Removal Notice filed in federal court, Georgia then sought, on the same day, to dismiss the entirety of Lapides' complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). See App. 2a; 535 U.S. at 616.

2. a. Lapides resisted the removal of the case to federal court and sought remand. The District Court denied the motion to remand. See App. 2a. The District Court then denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, holding that Georgia had waived its immunity by removing the case to federal court and then seeking a dispositive ruling on the merits. See App. 2a, 53a; 535 U.S. at 616-17. Although the District Court denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, it did grant dismissal on Lapides' section 1983 claims against the two named defendants in their personal

capacities. The remainder of Georgia's grounds for dismissal were rejected.

b. Georgia took an interlocutory appeal from the District Court's ruling that it had waived its Eleventh Amendment immunity, and the Court of Appeals reversed. App. 2a, 53a; 535 U.S. at 617. The Eleventh Circuit ruled that Georgia had not waived any Eleventh Amendment immunities by voluntarily removing the case to federal court. The Court of Appeals reversed and remanded to the District Court, which was "instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions exist, the whole case is to be remanded to state court." App. 53a; 535 U.S. at 617.

c. Lapides sought certiorari in this Court, which was granted. See 534 U.S. 991 (2001). A unanimous Court, Breyer, J., writing, then reversed, holding that when a States "removes a lawsuit from state court to federal court [it] waives [its Eleventh Amendment] immunity." 535 U.S. at 616. This Court limited its holding, however, making the following procedural observations:

> It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings. That is because Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Compare Tr. of Oral Arg. 57-58 (asserting that complaint also sought

> declaratory judgment on the federal claim), with complaint, App. 9-19 (failing, implicitly or explicitly, to seek any such relief). Hence this case does not present a valid federal claim against the State. Nor need we address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court.
>
> It has also become clear that, in the absence of any viable federal claim, the Federal District Court might well remand Lapides' state-law tort claims against the State to state court. 28 U.S.C. § 1367(c)(3). Nonetheless, Lapides' state-law tort claims against the State remain pending in Federal District Court, § 1367(a), and the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance. *Moor v. County of Alameda*, 411 U.S. 693, 712 (1973). Hence, the question presented is not moot. We possess the legal power here to answer that question as limited to the state-law context just described. And, in light of differences of view among the lower courts, we shall do so.

535 U.S. at 617-18 (citations omitted).

In closing its opinion, the Court concluded "that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity – though, as we have said, the District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state courts for determination. 28 U.S.C. § 1367(c)(3)." 535 U.S. at 1646.

3. a. On remand from this Court to the Eleventh Circuit, see 46 Fed. Appx. 617, 2002 WL 1798862 (11th Cir. July 15, 2002), and thence to the District Court, the District Court, in its discretion, remanded the remaining state law claims to state court. In order to proceed first with his pending Title VII claim (discussed below), Lapides subsequently dismissed without prejudice the pending state law complaint, pursuant to Ga. Code § 9-11-41(a); App. 153a. See App. 2a, 8a, 53a.

b. Lapides in 2001 filed the present verified complaint against the Regents in federal court. See App. 87a. The federal complaint exclusively raised employment discrimination and retaliation claims in violation of Title VII, see 42 U.S.C. § 2000e et seq. (2005). Lapides' original complaint, filed in state court in 2000, had not alleged a Title VII claim, although the original complaint noted that, concurrent with its filing, Lapides would file "a complaint with the Equal Employment Opportunity Commission [EEOC] based upon claims of disparate and discriminatory treatment against him on the basis of religion, gender and for retaliation. Upon the receipt of the appropriate authorization, it is anticipated that these claims will be added to the within and foregoing complaint as an amendment." App. 151a. Lapides only received a right-to-sue letter from the Georgia Commission on Equal Opportunity [GCEO] on June 26, 2001, App. 54a, subsequent to the removal of the original complaint to federal court and the appeals on the Eleventh Amendment issue. Indeed, the GCEO's right-to-sue letter was issued just prior to the filing of the Petition for Writ of Certiorari in the original proceeding before this Court.

b. After remand from this Court, and the District Court's remand of the pending state law claims to state court and Lapides' subsequent dismissal without prejudice of the state law claims, the Regents sought to dismiss the federal Title VII complaint, arguing that the underlying facts pled were identical

to the original, state court complaint, and that, according to this Court's ruling, there were no viable federal claims remaining, and such constituted a sufficient final judgment on the merits to qualify for dismissal on res judicata grounds. In a Report and Recommendation issued by a federal magistrate, after an agreed referral by the District Court, this res judicata defense was sustained. See App. 62a.

The magistrate recommended rejecting Lapides' arguments that (1) he could not have possibly brought his Title VII claims in the original, state court proceeding, because of the lack of a right-to-sue letter, and that the Regents' procedural maneuverings had prevented a subsequent amendment of the federal complaint; and (2) that there had been no final judgment on the merits because Lapides had voluntarily dismissed without prejudice the state law claims when they had been finally remanded back to state court, after this Court's 2002 ruling. As to the first issue, the magistrate, in making her recommendation, relied on precedent suggesting that parties could not split their causes of action, even where there had been a delay in issuing a right-to-sue letter. See App. 60a (collecting cases from the Second, Sixth and Seventh Circuits). The magistrate noted that while Lapides could not have amended his original, state court complaint, while it was pending on appeal in the Eleventh Circuit and this Court on the Eleventh Amendment waiver issue, he could have sought a right-to-sue letter from the GCEO at an earlier time. See App. 60a. As to the second issue, the magistrate noted that this Court had dismissed Lapides' federal claims against the Regents, and that such "was a final judgment on the merits," App. 61a-62a. The magistrate did not discuss the fact that the District Court previously had remanded Lapides' state law claims to state court, and thus, no final judgment had been issued and the lawsuit remained pending when the District Court confirmed there were no federal claims

pending against the Regents. The magistrate also did not discuss or consider the legal effect of Lapides' subsequent voluntary dismissal of the state complaint, even though under Georgia law, a voluntary dismissal without prejudice does not constitute a final judgment on the merits for res judicata purposes. See App. 62a.[1]

c. The District Court adopted the Report and Recommendation of the Magistrate, discussing only the res judicata ruling, and held that Lapides' Title VII claims were barred by res judicata. See App. 11a. The District Court expressly applied the Eleventh Circuit's decision in *Jang v. United Technologies Corp.*, 206 F.3d 1147 (11th Cir. 2000), holding that a plaintiff could not delay filing an action under the Americans with Disabilities Act (ADA), even without an EEOC right-to-sue letter, without suffering res judicata consequences. The *Jang* decision, in turn, followed the reasoning of the Second, Sixth, and Seventh Circuits on this aspect of res judicata jurisprudence. See App. 9a-10a (quoting *Jang*, 206 F.3d at 1149 (collecting cases)). In any event, the District Court granted summary judgment to the Regents on Lapides' Title VII claims, ruling that they were barred by res judicata.

d. The Eleventh Circuit affirmed. See App. 4a. In the operative part of the decision, the court of appeals held:

> [W]e conclude that the disposition of this case is controlled by our decision in *Jang*. There, we

[1] The Magistrate Report and Recommendation proceeded to address the substance of Lapides' religious discrimination and retaliation claims under Title VII, although without addressing the totality of circumstances that Lapides alleged, and recommended rejecting these claims on the merits on grounds that are not material to this Petition. See App. 64a-85a.

> held that "plaintiffs may not split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a 'right-to-sue' latter." *Jang*, 206 F.3d at 1149. Lapides claims that he did not plead his Title VII claim with the previous suit because he had not yet received a right-to-sue letter, but *Jang* instructs that he cannot split his cause of action in this manner. Lapides also argues that the previous claim was not finally adjudicated on the merits, but we disagree. As noted above, the Supreme Court (and this Court on remand) determined that Lapides did not present a valid federal claim against the Board.

App. 3a-4a.

e. Lapides sought a Petition for Rehearing, or in the alternative, a Petition for Rehearing En Banc, which was denied on March 8, 2005. See App. 5a. This timely Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

LOWER COURTS ARE IN SUBSTANTIAL DISARRAY AS TO THE PROPER CONTOURS OF CLAIM PRECLUSION IN TITLE VII CASES INVOLVING STATE PROCEEDINGS AND SUBSEQUENTLY ISSUED RIGHT-TO-SUE LETTERS

The nub of this return case to the Supreme Court is the nature and extent of the doctrine of res judicata, or claim preclusion, in Title VII and allied[2] employment discrimination and retaliation cases, as well as civil cases in general. While this case's first appearance in this Court implicated the issue of whether States waive their Eleventh Amendment immunity when they remove cases from state to federal court, see *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002) ("*Lapides I*"), this Petition concerns larger questions as to the interplay of state and federal law in making res judicata determinations involving complaints that have both federal and state claims. This Court's ruling in *Lapides I* is significant as to the characterization of some of Lapides' state court claims, and the lower courts in subsequent proceedings grasped onto this Court's language in *Lapides I* to render decisions which vastly expand the scope of the judge-made law of res judicata and holding that Lapides' subsequent, federal court Title VII complaint was barred.

[2] In addition to Title VII of the Civil Rights Act, other federal statutory schemes involve the administrative participation of the Equal Economic Opportunity Commission (EEOC) in issuing right-to-sue letters, most notably the Americans with Disabilities Act (ADA). See 42 U.S.C. § 12117(a).

This Petition raises concerns as to two crucial qualifications to the normally-applied rules of claim preclusion in Title VII cases. The first involves the timing of the procurement of right-to-sue letters from the EEOC or state authorities (such as GCEO), which are a statutory predicate for filing any employment discrimination or retaliation case under that statutory scheme. See 42 U.S.C. § 2000e-5(f)(1); *Patterson v. McLean Credit Union*, 491 U.S. 164, 181(1989). There is some tension in the decisions of the courts of appeals as to whether, in all cases, a successive complaint containing allegations of Title VII violations (filed after a right-to-sue letter is issued) is barred, under the doctrine of res judicata, by a final disposition to an earlier complaint which did not raise (and could not have raised) a Title VII count. Some courts of appeals, in contrast to the decision below, appear to have recognized some form of equitable exception to claim preclusion rules, especially where (as here) the defendant employer, through its own litigation conduct, hampered the plaintiff's ability to join his Title VII complaint with the pending complaint.

The second issue raised by this Petition is much broader in significance, applying to the full scope of res judicata doctrine. That is whether it is really essential to a claim preclusion bar that there have been a final judgment on the merits in an earlier proceeding sufficient to trigger res judicata. This has been taken as an article of faith in this Court's jurisprudence for many years. See *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). Lapides does not challenge the decision below because of some ostensible confusion regarding the standards of res judicata; the Eleventh Circuit clearly acknowledged that a "final judgment on the merits" was a requisite for res judicata to apply. See App. 3a (citing *Ragsdale*

v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999)). Nor does Lapides question the underlying logic of res judicata as a doctrine, the purpose of which is that the "full and fair opportunity to litigate protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Instead, the issue raised by this Petition is whether the requirement of a final judgment must be strictly construed in order to effectuate the goals of federalism and judicial cooperation, especially where state law would – in the normal course – control the claim preclusion effects of state court judgments. In other words, does a partial judgment on the merits by a federal court, where state law claims in the same lawsuit remain pending in state court, satisfy the final judgment prong of res judicata?

The court of appeals ruling below vastly expands the contours of res judicata doctrine, not only in the situational context of the Title VII and other employment claims, but also in its wider dimensions. It is especially incumbent on this Court, which has the last word on such judge-made rules as claim and issue preclusion, to insure the regularity and predictability of these doctrines. This is particularly so where the interplay of res judicata and coordinate federal remedial statutes can produce very harsh consequences for litigants.

A. Tension Exists In Lower Court Decisions As To Whether There Should Be An Equitable Exception To Res Judicata In Title VII Cases.

1. Lapides acknowledges that most courts of appeals are aligned as to the broad proposition that Title VII plaintiffs may

not split causes of action to bring state law claims in one suit and then file a second suit with federal causes of action after receiving a right-to-sue letter. See *Jang v. United Technologies Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000) (citing *Heyliger v. State Univ. & Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 855-56 (6th Cir. 1997); *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 339 (7th Cir. 1995); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2d Cir. 1992); *Rivers v. Barberton Board of Education*, 143 F.3d 1029 (6th Cir. 1998)). See also *Havercombe v. Dep't of Educ. of Puerto Rico*, 250 F.3d 1, 4-8 (1st Cir. 2001); *Churchill v. Star Enters.*, 183 F.3d 184, 193 (3d Cir. 1999); *Miller v. United States Postal Serv.*, 825 F.2d 62, 64 (5th Cir. 1987); *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 225 (7th Cir. 1993); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714-15 (9th Cir. 2001). The logic of these decisions is that plaintiffs are free to avoid the claim preclusive effects of their litigation conduct if they merely file one complaint raising non-Title VII state or federal claims, seek a stay of proceedings while they await a right-to-sue letter from the EEOC, and then, once the letter is procured, amend their original complaint. See *Woods*, 972 F.2d at 36.

But some courts have clearly recognized that there can be equitable exceptions to the application of res judicata principles in the Title VII/employment discrimination case context. See *Jang*, 206 F.3d at 1149 n.3 ("Appellant asks the Court to find manifest injustice or equitably modify the doctrine of res judicata on these facts. Appellant suggests that the alleged failings of the EEOC and the OFCCP prevented Appellant from receiving a "right to sue" letter. We see no basis for an equitable modification on the facts of this case."); *Devlin v. Transp. Communications Int'l Union*, 175 F.3d 121, 128-30 (2d Cir. 1999) (res judicata not applied, where actions were before same district court judge, and judge knew that they were

related and thus could have considered consolidating them); but see *Owens*, 244 F.3d at 714 (rejecting application of equity to modify res judicata principles in Title VII cases).

The Seventh Circuit has clearly staked-out a position recognizing an equitable exception to res judicata in the special circumstances of Title VII cases. In *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995), that court of appeals recognized that there may be situations where a district court may properly deny a Title VII plaintiff's leave to amend a complaint because such a move was "unduly delayed" or would cause "undue prejudice" to the defendant and the courts. See id. at 774. In that case, leave to amend was sought after discovery had closed in the case, and the defendant had filed a motion for summary judgment. See id. The court left open the question of whether denying a Title VII plaintiff's leave to amend would constitute an equitable exception to application of res judicata principles for a subsequently-filed lawsuit that did plead the Title VII count.

In *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d at 223 (7th Cir. 1993), the court of appeals, Judge Posner writing, had an extended discussion of situations where equitable principles might come into play with the timing of Title VII filings:

> Ordinarily (as here for example) the statutes of limitations governing the plaintiff's other claims will not be so short that he risks being barred from pursuing those claims by waiting to complete the Title VII administrative process. If he does face a looming deadline for suing on his other claims he can ask the EEOC or its state counterpart to accelerate the administrative process; he will have a good case for doing so.

> Moreover, an employer who sees an opportunity for settling the case informally with the aid of the EEOC may, in order to enable the administrative process to continue, agree with the employee not to plead the statute of limitations. . . . And finally the employee can sue on his other claims, ask the court – and again he would have a very strong case for doing so – to stay the proceedings until the Title VII administrative process is complete, and then if the process does not end in a way that satisfies him amend his complaint to add a Title VII count. These possibilities make the danger that applying res judicata in Title VII suits will interfere with the legislative design remote.

Id. at 225. Judge Posner's analysis clearly contemplates situations, out of the "ordinar[y]" course, where an equitable relaxation of res judicata principles may be appropriate.

2. Lapides would observe that this Court has not been entirely consistent in its statements as to the appropriate role of equitable exceptions to the application of res judicata. In *Brown v. Felsen*, 442 U.S. 127 (1979), this Court observed:

> Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.

Id. at 132. In another case, this Court has counseled lower courts to adhere to traditional principles of res judicata and not to make any "ad hoc determination of the equities in a particular

case," and so appeared to reject any equitable exceptions to the application of res judicata based on "public policy" or "simple justice." *Moitie*, 452 U.S. at 401. Some lower courts have construed this language as not necessarily barring an equitable exception to res judicata, as much as suggesting that particular equities – such as avoiding an "[in]accurate judgment or to avoid the injustice that might result from a strict application of the principles of finality" – are an improper judicial motivation. See *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1523 (10th Cir. 1997).

On the other hand, courts have recognized that seeking to reconcile two, conflicting decisions, or to harmonize a judgment with a federal statutory scheme, might be a permissible ground to modify the strictures of claim preclusion. See id; see also *Patterson*, 491 U.S. at 180 (federal laws should be construed in a manner that would not "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims."); but see *Woods*, 972 F.2d at 39 ("Woods and amicus curiae, the EEOC, argue that res judicata should not apply to situations like the one presented here because application of the doctrine would be inconsistent with the scheme of Title VII. Although we have not previously had occasion to address this issue, and while this Court is committed to giving full effect to the Title VII administrative scheme set up by Congress, we are of the opinion that the language and policy of Title VII do not undercut the application of res judicata, and we see no reason militating against application of well-settled claim preclusion principles.").

3. Obviously, there will be situations (as occurred here), where the *defendant's* litigation conduct made it practically impossible for a Title VII plaintiff, mindful of claim preclusion consequences, to act in the way counseled by these decisions. It was the Regents, after all, that removed the original complaint

from state court to federal court and then, contemporaneously, sought dismissal on Eleventh Amendment grounds. Appeals as to the propriety of the litigation tactic (including proceedings in this Court) consumed nearly three years, during such time the district court was functus officio as to any motion by Lapides to amend his complaint to include the Title VII count (once the right-to-sue letter was issued in June 2001). Even the lower court in this case acknowledged that Lapides could not have amended his complaint given the state's litigation behavior in this case. See App. 60a.

Lapides will, by no means, seek to advocate a broad, equitable exception to claim preclusion principles in Title VII and other employment discrimination contexts. The dockets of the federal courts are already over-burdened by these filings, and it is natural that these tribunals will have recourse to such a judge-made doctrine as res judicata or claim preclusion to weed-out frivolous or successive cases. Rather, the objective here is for the Court to articulate a narrow exception based on the common-sense principle that judge-made doctrines (such as claim preclusion) should not operate at odds with express statutory schemes (such as Title VII). Where a Title VII defendant's litigation conduct makes it practically impossible for a plaintiff to avoid filing a second complaint (this one featuring a Title VII count, after a right-to-sue letter has issued), sound principles of statutory construction and judicial policy make it inadvisable to follow a strict rule of res judicata. If it were otherwise, Title VII defendants would simply engage in particular forms of litigation tactics in order prevent a subsequent amendment of a complaint, and then later (once a second complaint was filed) argue claim preclusion principles as a bar.

B. The Decision Below Is Manifestly In Conflict With The Holdings Of Other Circuits That A Final Judgment on the Merits Is Required, In Order For Res Judicata To Apply.

1. As already noted, see *supra* at 10-11, the other analytic mis-step made by the court of appeals in this case has broader significance to the wider contours of res judicata jurisprudence. The lower court appeared to appreciably relax the requirement that there be a final judgment on the merits, in order for claim preclusion to apply. Curiously, the court of appeals appeared to rely on this Court's ruling, in *Lapides I*, that "Lapides had not presented a valid federal claim against the Board [of Regents]," and construed this as a final judgment on the merits. App. 4a. In actuality, what this Court observed in *Lapides I* was that

> because Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Compare Tr. of Oral Arg. 57-58 (asserting that complaint also sought declaratory judgment on the federal claim), with complaint, App. 9-19 (failing, implicitly or explicitly, to seek any such relief). Hence this case does not present a valid federal claim against the State.

535 U.S. at 617.

At most, this ruling could only constitute a partial judgment as to Lapides' claims, and certainly not a ruling on the

merits. As this Court said in *Lapides I*, "Lapides' state-law tort claims against the state remain pending in Federal District Court, and the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance." 535 U.S. at 618 (citation omitted).

On remand to the district court, the district court, in its discretion, remanded the pending state law claims to state court. It is axiomatic that when the district court remanded the lawsuit to state court, there was no final judgment in the lawsuit (otherwise there would have been nothing to remand), and this Court's prior ruling that there were no viable federal claims, adopted by the court of appeals and the district court as the law of the case, constituted at best a partial judgment.

Likewise, any reliance by the court of appeals, see App. 2a (or the district court, see App. 8a), on Lapides' voluntary dismissal without prejudice of his state law claims, once the case had been remanded back to state court, could not possibly be construed as a final judgment on the merits. It is black letter law in Georgia (and in federal courts) that a voluntary dismissal without prejudice has no preclusive effect under res judicata doctrine.

2. The Eleventh Circuit's relaxation of the "final judgment on the merits" condition for the application of res judicata, can be directly traced to a line of authority that creates a conspicuous split in the circuits. In making the decision it did, the court of appeals relied on its precedent in *Jang*, and appeared to reach the issue previously avoided in that decision. See 206 F.3d at 1149 n.2 ("We decline to address whether the *Jang I* court's dismissal of Appellant's ADA claim, based on his failure to obtain a 'right to sue' letter, was 'on the merits.' See *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th Cir.1998)."). In *Rivers*, the issue was whether a dismissal of a

Title VII claim made without benefit of a right-to-sue letter was "merely jurisdictional, or "on the merits," for purposes of claim preclusion. The Sixth Circuit noted:

> Rivers urges that a dismissal for failure to satisfy a condition precedent should not be considered an adjudication on the merits for claim preclusion purposes. She notes that at least two other circuits have adopted this position. See *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 679 n. 18 (5th Cir.1985); *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1218 (5th Cir. Unit B 1982); *Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 937 (4th Cir.1975). However, we need not decide this question today, because, as we will explain, the preclusive effects of the *Rivers I* suit would have obtained irrespective of whether the dismissal of the Title VII claim was considered to be on the merits.
>
> It is of no consequence here whether the Title VII claim was dismissed on the merits in *Rivers I* so long as some relevant portion of *Rivers I* was dismissed on the merits. It is undisputed that the *Rivers I* court dismissed with prejudice the race-discrimination claim premised on the myriad theories, including 42 U.S.C. §§ 1981 and 1983, contained in the *Rivers I* amended complaint. This was a final decision on the merits of the race-discrimination claim by a court of competent jurisdiction, not only as to those legal theories, but also as to any other legal theory under which that claim might have been litigated. See *Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Harrington v.*

> *Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 437 (6th Cir. 1981). Consequently, whether or not the dismissal of the Title VII claim was on the merits – indeed, whether or not a Title VII theory was even pleaded – element one was satisfied.

143 F.3d at 1031.

The Sixth and Eleventh Circuit's relaxation of the "final judgment on the merits" standard for Title VII cases has been contradicted by virtually every other court of appeals to consider the issue. Aside from the Fourth and Fifth Circuit decisions mentioned in *Rivers* itself, other courts of appeals have clearly articulated the rule that there must be a final, not a partial, judgment on the merits. See *Hill v. Potter*, 352 F.3d 1132, 1144 (7th Cir. 2003) ("[T]he 1997 decision disposed of the *entire* lawsuit, and was therefore a final decision" upon which res judicata could be based) (original emphasis); *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001); *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000); *Churchilll v. Star Enterprises*, 183 F.3d 184, 194 (3d Cir. 1999); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992). Additionally, the Eleventh and Sixth Circuit's analysis appears to conflict with this Court's time-honored approach as to the required complete finality of judgments for res judicata purposes. See *Cromwell*, 94 U.S. at 352; *Allen*, 449 U.S. at 94; *Moitie*, 452 U.S. at 398-99.

Insofar as the court of appeals relied on this Court's characterization of Lapides' claims in his first complaint, and the fact that no section 1983 claim for monetary relief could be made out against the State, such was not a "final judgment on the merits," sufficient to trigger res judicata. To the extent that the Eleventh Circuit characterized that ruling as a partial

judgment on the merits, this either perpetuates a split in the circuits as to what is a decision "on the merits" that would implicate claim preclusion, or went far beyond the established limits of jurisprudence as to the effect of judgments that decide less than the full range of a plaintiff's claims.

3. Lest there be any doubt on this point, to the extent that the lower courts relied on Lapides' voluntary dismissal of his state law claims, upon remand to the state court, such can have no res judicata consequences. For starters, the claim preclusion effects of a state court order are properly construed under that state's law. See *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 74 (1903); *Covington v. First Nat'l Bank*, 198 U.S. 100, 104 (1905); *Wright v. Georgia R. & B. Co.*, 216 U.S. 420, 428-29 (1910); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 6 (1940). This Court has expressly acknowledged this principle in the Title VII litigation context. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67 (1982).

Georgia law is unambiguous that a voluntary dismissal of a complaint by a plaintiff has no preclusive effect. See Ga. Code § 9-11-41(a)(3) ("A dismissal under this subsection is without prejudice, except that the filing of a second notice of dismissal operates as an adjudication on the merits."); App. 153a. This is also true for dismissals under the analogous provisions of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 41(a). See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990).

4. This Petition raises very significant questions as to the proper scope of the res judicata doctrine, especially in the context of Title VII and other employment litigation. As already discussed, it is not Lapides' intent to unsettle the fundamental premises that have guided this Court's jurisprudence in this

area. Rather, the objective is for the Court – using this case as an appropriate vehicle – to clarify the role of res judicata in Title VII proceedings, as well as reaffirm the requirement that there be a complete and final adjudication on the merits before any claim preclusive effect is sought for a prior judgment. It is incumbent for this Court – as the ultimate expositor for such judge-made doctrines as claim preclusion – to provide helpful guidance to lower courts, especially in situations (as here) where there are recurring problems in managing the complex interplay between res judicata principles and the requirements of federal statutory schemes.

CONCLUSION

For the foregoing reasons, the Petition should be GRANTED.

Respectfully submitted,

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June 2005

IN THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT
No. 04-12161

Paul D. LAPIDES,
Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Defendant-Appellant.

D.C. Docket No. 01-02554-cv-TWT-1

Appeal from the United States District Court for the Northern District of Georgia. (No. 01-02554-CV-TWT-1), Thomas W. Thrash, Judge.

December 27, 2004

Before BIRCH, BLACK and WILSON, Circuit Judges.

PER CURIAM:

Paul Lapides appeals the district court's grant of summary judgment in favor of the Board of Regents for the University System of Georgia ("the Board") in this Title VII employment discrimination action. The district court held that the suit was barred by res judicata. We agree, and therefore affirm.

In 2000, Lapides sued the Board in the Cobb County

Superior Court. He claimed that the Board violated his due process rights and defamed him, and thereafter treated him disparately and created a hostile work environment, in violation of 42 U.S.C. § 1983 and Georgia law. The Board removed the suit to federal court and then moved to dismiss the suit on Eleventh Amendment immunity grounds. The district court denied the motion to dismiss, but we held that the Board did not waive sovereign immunity by removing the case. *See Lapides v. Bd. of Regents,* 251 F.3d 1372, 1378 (11th Cir. 2001).

The Supreme Court in turn reversed our decision and held that a State waives its immunity when it removes a case to federal court. *See Lapides v. Bd. of Regents,* 535 U.S. 613, 624, 122 S. Ct. 1640, 1646, 152 L.Ed.2d 806 (2002). In its decision, the Supreme Court noted that "this case does not present a valid federal claim against the State." *Id.* at 617. On remand, we noted that only state law claims remained against the Board and remanded to the district court for it to determine if it would maintain jurisdiction over those claims or remand them to state court. *See Lapides v. Bd. of Regents,* No. 00-14984 (11th Cir. July 15, 2002) (unpublished). The district court remanded the state law claims, after which Lapides dismissed the complaint without prejudice.

In the midst of this long journey from the Cobb County Superior Court to the Supreme Court of the United States and back, Lapides in 2001 filed the present complaint in federal district court. He alleged employment discrimination and retaliation in violation of Title VII, based on the same set of facts as alleged in the previous complaint. The Board moved for summary judgment based on res judicata. Lapides argued that his previous claim did not result in a final judgment on the merits. The court granted summary judgment to the Board, and

Lapides appeals.

We review de novo a district court's grant of summary judgment and its application of res judicata. *Chapman v. A.I. Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (summary judgment); *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000) (res judicata). Summary judgment is appropriate when the evidence before the court shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In order for res judicata to apply, four elements must be present: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) the prior and present cases must involve the same parties; and (4) the prior and present cases must involve the same causes of action. *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999). "Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding." *Id.* The res judicata bar "extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984).

Upon our review of the record and the parties' briefs, we conclude that the disposition of this case is controlled by our decision in *Jang*. There, we held that "plaintiffs may not split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a 'right-to-sue' letter." *Jang*, 206 F.3d at 1149. Lapides claims that he did not plead his Title VII claim with a

previous suit because he had not yet received a right-to-sue letter, but *Jang* instructs that he cannot split his cause of action in this manner. Lapides also argues that the previous claim was not finally adjudicated on the merits, but we disagree. As noted above, the Supreme Court (and this Court on remand) determined that Lapides did not present a valid federal claim against the Board.

Because Lapides previously litigated a § 1983 complaint based on the same set of facts as this Title VII complaint, the district court did not err in granting summary judgment to the Board based on res judicata. Accordingly, we affirm the district court's order.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT
No. 04-12161

Paul D. LAPIDES,
Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Defendant-Appellant.

D.C. Docket No. 01-02554-cv-TWT-1

Appeal from the United States District Court for the Northern District of Georgia. (No. 01-02554-CV-TWT-1), Thomas W. Thrash, Judge.

March 8, 2005

Before: BIRCH, BLACK and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff, CIVIL ACTION FILE

vs. NO. 1:01-cv-2554-TWT

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Defendant.

JUDGMENT

This action having come before the court, Honorable Thomas W. Thrash, Jr., United States District Judge, for consideration of defendant's Motion for Summary Judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 1st day of April, 2004.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

CIVIL ACTION FILE
NO. 1:01-cv-2554-TWT

vs.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF
GEORGIA,

Defendant.

ORDER

This is a Title VII employment discrimination case. It is before the Court on the Magistrate Judge's Report and Recommendation [Doc. 116]. The Plaintiff is an Assistant Professor in the business school of Kennesaw State University. In 1997, a former student complained to the University administration that she had been sexually harassed by the Plaintiff. The University investigated the accusation and found that it was unsubstantiated. The University issued to the Plaintiff an unsatisfactory exoneration letter. After the complaint, the Plaintiff was awarded tenure. Nevertheless, the University's handling of the complaint provoked from the Plaintiff a torrent of complaints, grievances, protests, confrontations, demands for investigations, charges of discrimination and retaliation, appeals, accusations, recriminations and litigation that are set out in exquisite detail

in the 226 numbered paragraphs of the Plaintiffs Statement of Material Facts. The Plaintiff contends that the University has made his life miserable, and it is clear that he has done his best to make life miserable for some of the faculty and administrators at the University. In her Report and Recommendation, the Magistrate Judge recommended granting the Defendant's Motion for Summary Judgment [Doc. 89]. The Plaintiff objects to the Report and Recommendation. He contends that there is a genuine issue of fact as to whether the University treats Jewish complainers and troublemakers more harshly than Jews who are "compliant and docile" and more harshly than non-Jewish troublemakers.

This is the second lawsuit filed by the Plaintiff arising out of the same facts and circumstances. The first suit against the Board of Regents and University faculty and administrators was filed in the Superior Court of Cobb County. It was removed to this Court by the Defendants. The Plaintiff did not assert Title VII claims in that action because he had not exhausted his EEOC administrative remedies as to those claims. The 42 U.S.C. § 1983 claims were dismissed on the grounds of qualified immunity. After an appeal to the Eleventh Circuit and the United States Supreme Court, the remaining state law claims were remanded to state court where they were voluntarily dismissed.

The Defendant contends that this action is barred by res judicata. The outcome here is controlled by the Eleventh Circuit decision in Jang v. United Technologies Corp., 206 F.3d 1147 (11th Cir. 2000). In that action, the plaintiff filed an action under the Americans With Disabilities Act ("ADA") and under state law for breach of contract and violation of the Florida Civil Rights Act. On motion for summary judgment, the ADA claim

was rejected because the plaintiff did not have a right-to-sue letter. The state law claims were denied on the merits. The plaintiff later obtained a- right-to-sue letter and filed a second suit which was dismissed on the grounds of res judicata.

On appeal, the Eleventh Circuit affirmed. The court described the elements of a res judicata bar as follows:

> Specifically, it will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same.

Id. at 1149 (quoting Israel Discount Bank Ltd. v. Entin, 951 F.2d 311, 314 (11th Cir. 1992)). The court noted that all four elements were present in that case. It then stated:

> Appellant explains that he attempted to obtain a "right to sue" letter before filing Jang I but that the Equal Employment Opportunity Commission (EEOC) and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) failed to transmit the letter. At least three other Circuits have rejected similar arguments and held that plaintiffs may not split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a "right to sue" letter. See Heyliger v. State University & Community College System of Tennessee, 126 F.3d 849, 855-56 (6th Cir.

> 1997) (noting that plaintiff had duty to request right to sue letter and amend state complaint); Brzostowski v. Laidlaw Waste Systems. Inc., 49 F.3d 337, 339 (7th Cir. 1995) (explaining that plaintiff could not split causes of action and bring a federal claim later); Woods v. Dunlop Tire Corp., 972 F.2d 36, 41 (2d Cir. 1992) (stating that plaintiffs may avoid claim preclusion by filing their other claims and seeking a stay to await the Title VII administrative proceeding or by filing the other claims and then amending after obtaining the right to sue letter). In the most analogous case, Rivers v. Barberton Bd. of Educ.,143 F.3d 1029 (6th Cir. 1998), the Sixth Circuit affirmed the application of res judicata to bar a suit involving a Title VII claim after the court had dismissed a factually related federal claim on the merits in a prior suit between the parties. See Rivers. 143 F.3d at 1032.

Id. The court then held:

> We agree with these other Circuits, and the district court in this case, and hold that res judicata barred Appellant from splitting his causes of action and bringing his ADA claim after his first suit proceeded to a judgment on the merits.

Id. This case appears to be precisely on point. The Plaintiff argues that it does not apply because his state law claims were dismissed without an adjudication on the merits. This

argument, however, overlooks the fact that there was a final adjudication on the merits of the section 1983 claims. Following Jang, the Plaintiff was required to litigate his Title VII claims in the first action. He is not permitted to split his causes of action as he has done. His objections to the Report and Recommendation are overruled. The Court approves and adopts the Report and Recommendation as the judgment of the Court. The Defendant's Motion for Summary Judgment [Doc. 89] is GRANTED. The Motion to Quash [Doc. 86] is DENIED as moot.

SO ORDERED, this 24 day of March, 2004.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

CIVIL ACTION FILE
NO. 1:01-cv-2554-TWT

vs.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Defendant.

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Attached is the Report and Recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(l) and this Court's Local Civil Rule 72.1. Let the same be filed and a copy, with a copy of this order, be served upon counsel for the parties.

Each party may file written objections, if any, to the attached Report and Recommendation within ten (10) days after being served with a copy of it. 28 U.S.C. § 636(b)(l). Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing

for review by the District Court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the District Court and any appeal of factual findings will be limited to a review for plain error or manifest injustice. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984).

The Clerk is **DIRECTED** to submit the Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

IT IS SO ORDERED, this 13 day of February, 2004.

/s/ Susan S. Cole
SUSAN S. COLE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

CIVIL ACTION FILE
NO. 1:01-cv-2554-TWT

vs.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Defendant.

FINAL REPORT AND RECOMMENDATION

This case is before the court on Defendant's Motion for Summary Judgment [Doc. 89].

I. Procedural History

Paul D. Lapides ("Plaintiff") is employed as an Assistant Professor by Kennesaw State University ("KSU"), a four-year university within the University System of Georgia. The Board of Regents of the University System of Georgia ("Defendant") is the state entity responsible for the "government, control, and management of the university system and all of its [public] institutions. . . ." O.C.G.A. § 20-3-51. Plaintiff, who was born and raised Jewish and affiliates with the Messianic Jewish movement[1], complains in this action that Defendant unlawfully

[1]Messianic Jews regard Jesus, or Yeshua, as the Messiah. (Lapides (continued...)

discriminated against him because of his religion in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII")(Count I), and retaliated against him in violation of Title VII (Count II).

Defendant filed a Motion for Summary Judgment seeking summary judgment as to all of Plaintiff's claims [Doc. 89]; Plaintiff filed a response in opposition to Defendant's motion [Doc. 96]; and Defendant filed a Reply [Doc. 105]. Oral argument on Defendant's motion was held on October 24, 2003 [see Doc. 115].

II. The Parties' Objections to Evidentiary Submissions

A. Defendant's Objections

Defendant filed "Objections by Defendant to Plaintiffs' Affidavits" [Doc. 106] in which Defendant objects to portions of the affidavits of Plaintiff, Amanda Ogilvie and Carol D. Edwards which were filed by Plaintiff in opposition to Defendant's Motion for Summary Judgment.

1. Plaintiff's Affidavit

Defendant objects to "portions of Paragraphs 6, 7, 10, 18 (stating that Plaintiff endured 'retaliation and harassment' and a 'hostile work environment'), 9 (stating that delayed disclosure of documents was an 'adverse action'), 11, 13, 16, 18 (purporting to summarize KSU personnel files), 13 (stating that Plaintiff and another Jewish faculty member received the lowest raises in the department), 14, 15, 16, 17, 18 (repeating purported statements

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[1](...continued)
depo., p. 71).

of other persons), 15 (stating that 'KSU, and Coles College, specifically, national and local business communities, and KSU's students and alumni, have benefitted greatly from efforts of the CGC faculty and fellows'), 16 (making statements regarding the absences of other professors), 15, 18 (stating the motivations of Professor Hermanson in resigning and making statements about the motivations of [Professor Kamal] Fatehi and [Coles College Dean Timothy] Mescon in other contexts), 21 (stating that certain documents were not produced in discovery)."

Defendant objects to these portions of Plaintiff's affidavit on the following grounds: Defendant offered to produce all of its personnel files; Plaintiff does not specify which files he purports to summarize; his statements are not proper summaries; Defendant's personnel files do not state the religious affiliation of faculty, and therefore, there would be no way for Plaintiff to know which faculty members are Jewish; the statements are irrelevant; Plaintiff does not show which documents were not produced in discovery; the statements constitute the expression of inadmissible opinions, violate the best evidence rule, are inadmissible hearsay, and are not based on personal knowledge.

2. **Ogilvie's Affidavit**

Defendant objects to the entire Ogilvie Affidavit because Plaintiff did not identify Ogilvie in his Initial Disclosures, and Defendant objects to portions of Paragraphs 9 (repeating purported statements of a professor and another student), 12 (repeating purported statements of Plaintiff). Defendant objects on the grounds that these statements are irrelevant, constitute inadmissible hearsay, and are not based on personal knowledge.

3. Edwards' Affidavit

Defendant objects to portions of Paragraphs 7 and 8 (repeating purported statements of a committee member) on the grounds that these statements are irrelevant, constitute inadmissible hearsay, and are not based on personal knowledge.

B. Plaintiff's Objection to Rugg's Declaration [Doc. 110]

Plaintiff objects to Paragraphs 7-8, 10-18 and 20 of the Declaration of Edwin Rugg filed by Defendant in support of its Motion for Summary Judgment. [See Doc. 110]. Plaintiff contends that these paragraphs rely on information and documents that were not provided to Plaintiff in response to Open Records Act[2] and discovery requests.

In Defendant's Response [Doc. 111] to Plaintiff's objection to the Rugg Declaration, Defendant argues that Plaintiff's objection to the Rugg Declaration was untimely. The Rugg Declaration was filed on April 24, 2003 as part of Defendant's Motion for Summary Judgment, yet Plaintiff did not object to it when he filed his response to Defendant's Motion for Summary Judgment on June 16, 2003, and did not file his objection to the Declaration until August 18, 2003, over four months after it was filed. Defendant also argues that it made the personnel files referenced by Rugg available to Plaintiff for review.

The court will consider the parties' objections to the admissibility of the evidence at issue in its discussion of

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[2] O.C.G.A. § 50-18-70, *et seq.*

Defendant's motion for summary judgment, where relevant. See Pinkerton & Laws Co. v. Roadway Express, Inc., 650 F.Supp. 1138, 1141 (N.D. Ga. 1986)("[T]he court will assess the admissibility of evidence presented through affidavits, depositions, or any other method as part of its consideration of the motion.").

III. Background Facts

A. Standards for Determining Facts for Summary Judgment

The "facts," for summary judgment purposes only, are derived from the submissions of the parties, as set out in Defendant's "Statement of Material Facts Not Genuinely in Dispute" [Doc. 89] (hereinafter referred to as "Def. SMF"), Plaintiff's "Statement of Material Facts as to Which There are Genuine Issues to be Tried" [Doc. 96], as well as uncontroverted record evidence. The facts are construed in the light most favorable to Plaintiff as the non-movant. See Frederick v. Sprint/United Mgmt.Co., 246 F.3d 1305, 1309 (11th Cir. 2001).

As required by LR 56.1B(1), NDGa., Defendant filed a Statement of Material Facts Not Genuinely in Issue [Doc. 89], which is comprised of 106 numbered paragraphs, with its motion for summary judgment. Plaintiff did not respond "to each of the movant's numbered material facts" as required by LR 56.1B(2). Plaintiff did file a "Statement of Material Facts as to Which There are Genuine Issues to be Tried [Doc. 96], comprised of 226 numbered paragraphs. These statements do not correspond in any way to the numbered paragraphs of Defendant's Statement of Material Facts, however. Furthermore, it is not clear which of Defendant's statements Plaintiff contends are in dispute.

Therefore, it appears that Plaintiff has not complied with LR 56.1B(2)'s response requirements. LR 56.1B(2) further provides that "[a]ll material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement shall be deemed to have been admitted."[3] The undersigned has, nevertheless, reviewed all of the record evidence to determine if there are genuine issues of material fact in dispute.

B. The Facts Relevant to the Undersigned's Consideration of Defendant's Motion for Summary Judgment

Defendant Board of Regents of the University System of Georgia ("University System") is the state entity responsible for the "government, control, and management of the university system and all of its [public] institutions." O.C.G.A. § 20-3-51. Kennesaw State University ("KSU") is a public four-year university located in Kennesaw, Georgia, offering a variety of undergraduate and graduate level programs and degrees. (Def. Ex. A, ¶ 3). In the fall of 2002, KSU had over 15,000 students enrolled, and about 400 persons employed as full-time faculty. (Def. Ex. A, ¶ 3). The Coles College of Business is KSU's business school, which offers both undergraduate and graduate degrees in various business disciplines and, in 2001, employed approximately 80 faculty members. (Def. Ex. A, ¶ 4).

Paul D. Lapides ("Plaintiff") was hired by KSU as an Assistant Professor in the summer of 1993 to teach in the

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[3] For example, in Defendant's SMF, ¶¶ 99-104, Defendant sets forth facts material to its res judicata argument, discussed below. However, Plaintiff did not respond to any of these facts in his Statement of Material Facts. Therefore, these facts are deemed admitted.

Department of Management and Entrepreneurship in the Coles College of Business at KSU. (Complaint, ¶ 16). Plaintiff was born and raised Jewish, and he affiliates with the Messianic Jewish movement. (Complaint, ¶ 1). Plaintiff has a Bachelor of Science in economics and a Masters of Business Administration. (Complaint, ¶ 10). Plaintiff does not have a doctorate degree, and has no plans to pursue one. (Def. Ex. B, PL01083-84; Lapides depo., p. 276). Plaintiff still holds the position of Assistant Professor at KSU. (Def. Ex. B, D199; Complaint, ¶ 16; Lapides depo., p. 4).

In the summer of 1995, Plaintiff co-founded, with Dr. Dana Hermanson, the Corporate Governance Center ("CGC"). (Complaint, ¶ 19; Joint Depo. Ex. 37). The CGC provides corporate governance information to directors, researchers, professors, advisors and other interested parties. (Complaint, ¶ 20). In 1996, Plaintiff received two Awards of Excellence from the Coles College of Business, including one for his work with the CGC. (Complaint, ¶ 25). In 1997, Plaintiff received another Award of Excellence from Coles College of Business for his work with the CGC's Director's University programs. (Complaint, ¶ 26).

The 1997 Faculty Handbook sets forth procedures for handling student complaints against faculty members. (Pl. SMF, ¶ 30). The policy states that: "[t]his procedure is not applicable to cases involving discrimination, sexual harassment, or violation of stated grade policy. In those instances, the established KSU procedures (see KSU catalog) should be followed." (Id.) The KSU catalog provides that "all student grievances or complaints alleging action of a discriminatory nature shall be addressed in writing to the deputy title IX coordinator [i.e., Melvis Atkinson]." (Pl. SMF, ¶ 31).

In September 1997, former Chair of the Coles College School of Business' Department of Management and Entrepreneurship, Teresa Joyce (previously Teresa Covin)(who was Lapides' Chair from 1997 through 2000), E-mailed a statement to all of the KSU business faculty, reminding them of the university's "zero tolerance" policy regarding sexual harassment, which, like the policy in the KSU catalog, provided that faculty were to report student complaints of sexual harassment to Atkinson's office. (Pl. SMF, ¶ 32). The policy in the KSU Handbook for student complaints against a faculty member other than for discrimination or sexual harassment is different from the one in the KSU catalog and involves five procedural steps with the purpose of resolving complaints at the "lowest level possible." (Pl. SMF, ¶ 33).

In July 1997, Laurie Lunn, one of Plaintiff's former students, contacted Teresa Joyce to set up a meeting with Joyce "to discuss ...a conflict with a faculty member." (Joyce depo., p. 55). At the meeting, Lunn informed Joyce of allegedly inappropriate statements and conduct by Plaintiff during a course she had taken from him in the fall of 1996. (Lunn depo., pp. 10-12; Joyce depo., pp. 54-55). Lunn came forward "after graduating and after thinking about the class [and deciding] that it was important that the school be aware of what [she] believed was going on in the class." (Lunn depo., p. 10). Joyce met with Lunn, and Lunn gave her some notes she had taken in her class with Plaintiff. (Joyce depo., pp. 57-58, 66; see also Def. Ex. B, PL05394-99). Lunn reported that she "felt that she had been treated improperly by [Plaintiff] during a previous class." (Joyce depo., p. 66). Specifically, Lunn reported that Plaintiff "acted in an intimidating manner toward her, that he singled her out for harsh treatment in the class . . . she talked in general about her discomfort with how [Plaintiff] acted toward her in class and

some instances outside of class." (Joyce depo., pp. 66-67). Lunn reported that she "had some concern about filing the charge because of what [Plaintiff] might do to her," and Joyce told Lunn that "it was up to her whether or not she proceeded." (Joyce depo., p. 68). Joyce told Lunn that she would report the matter to the Office of Minority Affairs, and told Lunn the next day that Lunn would be hearing from Melvis Atkinson, KSU's EEO officer.[4] (Complaint, ¶¶ 32, 34; Joyce depo., pp. 56-57).

Joyce also discussed the matter with the Tim Mescon, the Dean of the College of Business and Joyce's supervisor, to find out how she "needed to go forward," and gave a copy of Lunn's notes to Dr. Mescon. (Joyce depo., pp. 56, 58). On July 15, 1997, Mescon sent a memorandum to Atkinson requesting that Atkinson "launch an investigation into this matter." (Joint Depo. Ex. 25). The memorandum indicated that he and Joyce had conferred with Flora Devine (KSU's legal affairs officer), and that Devine had "recommend[ed] this process." (Id.). Mescon informed Atkinson that Joyce had Lunn's log "regarding various inappropriate comments made by [Plaintiff]," and that those would be shared with Atkinson "in a formal meeting." (Id.). Atkinson sent a memo to Mescon on July 16, 1997 indicating that she had received his July 15, 1997 memo, but that "to make sure the University is not held liable for pursuing an inappropriate investigation, I will need immediately the charges brought forth by the student. Having this information in writing will make it possible for me to do my job and follow the proper

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[4] At all times relevant to the Complaint, Atkinson was the coordinator of KSU's Office of Affirmative Action and Minority Affairs. (Atkinson depo., p. 28). It was Atkinson's responsibility to ensure that KSU complied with Title VII of the Civil Rights Act of 1964. (Atkinson depo., pp. 61, 66-67). Atkinson testified that as coordinator of Minority Affairs, all sexual harassment complaints came to her. (Atkinson depo., p. 62).

course of investigating the charge." (Joint Depo. Ex. 1 at PL05364).

Lunn then met with Atkinson on July 23, 1997 and filed a written complaint of sexual harassment against Plaintiff. (Def. Ex. B, PL05361-62, PL05378; Lunn depo., p. 13). Atkinson made notes of her interview with Lunn, during which Lunn became upset and cried at various points. (Def. Ex. B, PL05363). Atkinson requested that Lunn prepare a written, notarized statement and provide witnesses. (Id.). On July 28, 1997, Lunn prepared a notarized statement chronicling what she alleges occurred during Plaintiff's class. (Def. Ex. B, PL05384-87; Lunn depo., pp. 7-8).

On August 1, 1997, Atkinson spoke with Plaintiff about Lunn's allegations. (Def. Ex. B, PL05378-81). Plaintiff expressed surprise at the allegations and stated that he never spoke of sex in the classroom. (Def. Ex. B, PL05382). Atkinson told Plaintiff that she would be talking to his Dean and Chair. (Id.). Atkinson also gave Plaintiff a letter, dated August 1, 1997, stating that a student in his Fall Small Business Management class had filed a complaint against him. (Complaint, ¶ 47; Def. Ex. B, PL02050). The letter stated, "[d]uring your class:" and then listed several of Lunn's allegations. (Def. Ex. B, PL02050-51). Atkinson also wrote:

> Please understand that this is a very serious complaint and that such behavior makes for a hostile, offensive, and intimidating learning environment for students. These actions are not acceptable by Kennesaw State University and are grounds for sexual harassment.

(Id. at 02051). Atkinson enclosed a copy of KSU's policy on sexual harassment from the Faculty Handbook and advised that in no way should anyone retaliate against someone making a claim of sexual harassment. (Id.). Atkinson closed by reminding Plaintiff than anyone found in violation of this policy may be subject to discipline. (Id.). The letter did not include a copy of the complaint or name the complainant.[5] (Id.). Plaintiff was given ten (10) days to reply to the allegations. (Def. Ex. B, PL05382).

Atkinson also interviewed Jim Herbert, another professor in whom Lunn had confided while she was in Plaintiff's class. (Def. Ex. B, PL05365-57). Herbert confirmed that Lunn had talked to him about Plaintiff's allegedly inappropriate behavior and comments. (Id.). Herbert told Atkinson that Lunn complained of sexual overtones in the classroom and wanted to drop the course. (Id.). Herbert suggested that Lunn should try to talk to Plaintiff, but she indicated that she did not feel comfortable with that. (Id.).

Atkinson also interviewed Joyce to learn what Lunn had discussed with her and to get Plaintiff's class roll. (Def. Ex. B, PL05368-70). Joyce mentioned that a student, Velvet Clay, had previously made allegations about Plaintiff, and Joyce gave Atkinson notes about those allegations. (See Joint Depo. Ex. 27).[6] Joyce also told KSU's legal affairs officer, Flora Devine,

[5] Atkinson testified that she could not recall a case, involving either sexual harassment or discrimination, other than Plaintiff's, in which she did not identify the complaining party in her notice letter to the employee or in which she did not provide the accused with a copy of the complaint. (Atkinson depo., pp. 288-89).

[6] While there is some dispute about when Joyce actually created these notes, and the accuracy of some details of these notes (see P. SMF, ¶¶

(continued...)

that she thought the Lunn allegations were similar to Ms. Clay's allegations against Plaintiff. (Devine depo., pp. 217-18).

Atkinson then obtained the names and phone numbers of students in the same class as Lunn, and Atkinson was able to interview eight of the students, including Lunn. (Complaint, ¶ 51; Def. Ex. B, PL03693, PL05379). None of the students corroborated Lunn's allegations. (Complaint, ¶ 51; Def. Ex. B, PL05379). One female student, Julie Burtz, said that before class and at the end of class, Plaintiff talked and joked about going to bars and picking up women, however. (Def. Ex. B, PL05379).

On August 11, 1997, Plaintiff responded to Atkinson's letter with a notarized letter asserting that Lunn's allegations were untrue (Joint Depo. Ex. 18, PL05054-57), and attaching, *inter alia,* supporting affidavits from two students in the class in question, Brigitte Cannizzaro and John Williams. (Id. at PLO5122-30). Plaintiff also attached the affidavit of another student, George Nixon, regarding Lunn's behavior in another class. (Id. at PL05131-34). Plaintiff concluded in his letter, "[i]f you wish to continue your investigation, I request a meeting with you and appropriate counsel to discuss handling this matter in such a way that protects my rights." (Id. at PL05056).

On August 28, 1997, Atkinson completed her investigation and wrote Plaintiff, "[t]his office has completed its investigation of a charge of sexual harassment brought against

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(...continued)

43, 45, 157; Def. Reply to Pl. SMF ¶¶ 43, 45, 157), there is no dispute that in April 1996, a student in one of Plaintiff's classes, Velvet Clay, reported that Plaintiff made inappropriate comments to her, and the Joyce spoke with Plaintiff about Clay's allegations. (Lapides depo, p. 133).

you. . . . Evidence gathered during the investigation did not support the claim of a sexually hostile environment alleged to have been part of [your] class." (Def Ex. B, PL02058). Atkinson added, "there was at least one other student in the class who had concerns about your conduct, joke telling, before and at the end of the class lectures. In light of this, I suggest that at all times you display a professional educational atmosphere. . . ." (Id.). Atkinson suggested that Plaintiff make an appointment with Atkinson's office to view an educational video on sexual harassment. (Id.). Atkinson also wrote a letter to Lunn in which she stated:

> This office has completed its investigation of your charge of sexual harassment against Dr. Paul Lapides. Evidence gathered during this investigation did not support your claim of a sexually hostile environment in the Fall 1996 MGT 421 Small Business Management class in which you were a student and Dr. Lapides was the instructor.

(PL Ex. E, PL05170).

On August 29, 1997, Atkinson met with Plaintiff and told him the findings of her investigation: that the evidence gathered did not support the claim of sexual harassment. (Complaint, ¶ 57; Def. Ex. B, PL05379). According to Atkinson's notes of this meeting, Plaintiff "was very concerned that [Atkinson's] letter was not more direct, that [Atkinson] did not say something to the effect that he had not committed sexual harassment." (Def. Ex. B, PL05380). Plaintiff "kept insisting that [Lunn] had defamed him." (Id.). Atkinson explained that because Lunn was no longer a student, there was nothing KSU could do, but maybe

Plaintiff "should see his lawyer. As far as this office is concern[ed] the investigation is over." (Id.). Plaintiff stated that he did not know why Lunn would do this except that he is Jewish. (Id.). Atkinson wrote, "[t]his statement really surprised me because as I talked to Lunn, to other[] students in his class, Herbert, Covin [Joyce] and Mescon[,], no one ever gave the slight[est] indication that they were thinking about race or religion." (Id.). Atkinson wrote that she asked Plaintiff why he believed that, because Atkinson did not know that Plaintiff was Jewish, and she doubted that Lunn did, but Plaintiff began "talking to [Atkinson] in general and wanted to know what should a professor do if a student approaches him and wanted to date him. . . ." (Id.).

Plaintiff alleged in his Complaint that he informed Atkinson at that meeting that "another student in his Fall 1996 course with Lunn had raised the **possibility that Lunn's complaint was motivated by gender bias and by anti-Semitism:** Lunn had told the other student that Lapides reminded her of her ex-husband and that **she hated all men and all Jews."** (Complaint, ¶ 61 (emphasis in original)). In his deposition, Plaintiff testified that he "reported what a student had told me[,] that [Lunn] may have been motivated by anti-Semitism, but I would have no basis to know of [Lunn's] state of mind." (Lapides depo., p. 134). Plaintiff believes that the student was John Williams, and thinks that Williams "said something like, do you think she did this because she was anti-Semitic or she hated Jews." (Lapides depo., pp. 134-35). Mr. Williams is one of three students who provided affidavits attached to Plaintiff's response to the Lunn complaint. (See Joint Depo. Ex. 18, PL05127-28). Mr. Williams made no statement in his affidavit regarding Lunn's alleged anti-Semitism. (Id.). Ms. Cannizzaro, one of the other students who provided

an affidavit (id., at PL05122-26), similarly made no mention of Ms. Lunn's possible anti-Semitic motivation in bringing the complaint. In an affidavit by a student who .attended another class with Ms. Lunn, George Nixon, Nixon described derogatory comments Lunn allegedly made regarding men, but did not testify that Lunn made anti-Semitic comments. (Id. at PL05131-34). Lunn testified that she was not aware that Plaintiff was Jewish at the time of her complaint against him, during the investigation, and even later. (Lunn depo., p. 40). Furthermore, Lunn testified that she has no bias towards Jewish people, and that Plaintiff's religion or ethnicity had nothing to do with her complaint. (Id.).

Atkinson also met with Lunn on August 29, 1997, and told her the outcome of the investigation. (Def. Ex. B, PL05381). Lunn appeared disappointed and upset, but when Atkinson told her that the investigation was ended and that Lunn should have no contact with Plaintiff, Lunn said she understood. (Id.).

On September 3, 1997, Plaintiff mailed Atkinson a letter (Def. Ex. B, PL02062-64), which began: "I was happy to hear that your investigation found no evidence to support Miss Laurie Lunn's claim that I created a sexually hostile environment. . . . According to your letter and oral report of August 28, 1997, your investigation indicated that there was not one scintilla of evidence to support her allegations." (Id. at PL02062). Plaintiff then addressed some of his concerns regarding his meeting with Atkinson on August 29, 1997,[7] and provided additional information refuting Lunn's allegations. (Id. at PL02062-63).

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[7] Although Plaintiff's September 3, 1997 letter refers to August 28, 1997 as the date of the meeting, the record indicates that the meeting occurred August 29, 1997. (See Def. Ex. B, PL05379).

Plaintiff reported that Lunn had telephoned him, and that he was concerned for his safety. (Id. at PL02063). Plaintiff wrote, "I have been advised that Miss Lunn has libeled and slandered me and that I should consider (a) filing a lawsuit to stop her from continuing such behavior and (b) obtaining a restraining order to stop Miss Lunn from harassing me and my family." (Def. Ex. B, PL02064). Although the letter alleges Lunn's purported gender bias, there is no mention in the September 3, 1997 letter regarding anti-Semitism. Plaintiff concluded, "The finding of 'no evidence' to support Miss Lunn's allegations gives me some confidence that the system at Kennesaw works. At the same time, I am not at all confident that my rights have been properly protected." (Id. at PL02064).

Plaintiff alleges that on September 3, 1997, Joyce publicly insisted to Plaintiff that he should meet with her and Mescon to discuss Atkinson's findings. (Complaint, ¶ 78; Joyce depo., pp. 13-14, 21). Plaintiff alleges that Joyce "yelled at [him], in listening distance of other professors, stating that she was not happy with the EEO office findings, could see how some of the things Lunn had said were true, and wanted to make sure it never happened again." (Pl. SMF, ¶ 64; see also Lapides depo., pp. 92-94; Joyce depo., pp. 15-17, 134-35). Plaintiff questioned the need for such a meeting if he had, in fact, been cleared of any wrongdoing. (Joyce depo., p. 14). Plaintiff suggested "that the subject of any meeting should include (a) possible litigation against Lunn for filing a false complaint, **especially if Lunn had made the complaint because Lapides was Jewish,** and (b) reviewing and improving KSU's procedures for investigating sexual harassment complaints in general and addressing the mistreatment of him in particular." (Complaint, ¶ 79) (emphasis in original). Joyce's notes of the conversation indicate that Plaintiff stated that Lunn is "a liar, [she] made

everything up," and that "[i]f this is because I'm Jewish, then this is going to be really big." (Joint Depo. Ex. 82; see also Joyce depo., pp. 18-19).

Atkinson met with Joyce on September 4, 1997, and according to Atkinson's notes, they discussed Atkinson's findings and specifically discussed Plaintiff's concerns about anti-Semitism. (Joint Depo. Ex. 1, PL05390). Joyce told Atkinson that she was "taken back when [Plaintiff] made reference to his religion in this case. [Joyce] related having told him that nothing in this case mentioned his religion and never was this brought up when she talked to the student." (Id.). Atkinson made several suggestions to Joyce regarding sexual harassment training and investigations. (Id.)

Plaintiff wrote an E-mail to Joyce on September 4, 1997 in which he stated, *inter alia,* that he wanted to meet with her. He continued,

> I thought I was near the end of all this, now that the Office of Minority Affairs issues [sic] the 'no evidence report.' But, based on you[r] comments yesterday, it seems that you do not accept their findings. You expressed a lot of hostility toward me yesterday and, quite frankly, said some things that I feel were really inappropriate. Not to mention, how uncomfortable it was listening to some of your comments, knowing that others could hear you.

(Complaint, Attachment 10). Joyce responded to Plaintiff in an E-mail in which she wrote *inter alia:*

> I dropped by your office yesterday, after receiving the letter from the Office of Minority Affairs, simply to tell you that I'd like to meet at some point in time. I said that I think we need to talk about the letter - I don't understand how this indicates that I 'do not accept their findings.' Further, as your manager, it's my responsibility to follow up on the report - this is standard procedure and should not be interpreted as hostility toward you. I do not believe any 'inappropriate statements' were made - I only responded to your comments, and told you repeatedly that I wanted to wait to discuss these issues in a private meeting. In fact, I was very careful in my words given your mention of the possibility of lawsuits concerning this event.
>
> I think this matter should be put to rest. It is my responsibility to discuss the recommendations made by Melvis Atkinson with you and we can do that at our meeting in the morning. It is clear to me that these allegations have upset you. However, the investigation has been completed, I accept the findings, and I think some helpful suggestions have been made. I would like to bring closure to these issues tomorrow. I am not willing to give you advice on how you should proceed with any legal action.

(Id.).

Joyce sent a memorandum to Melvis Atkinson on September 10, 1997, in which she wrote, *inter alia*:

> I met with Paul Lapides on Friday September 5 in order to discuss your letter to him dated August 28, 1997. The letter indicates that there was no evidence to support the claim of a sexually hostile environment in his Fall 1996 Small Business Management class.
>
> Paul has several questions about the letter and its content that I am unable to answer. I have asked him to schedule a meeting with you to discuss any questions he might have.

(Id.).

On September 19, 1997, Atkinson responded to Plaintiff's September 3, 1997 letter because she believed that there were several comments by Plaintiff that did "not give a clear understanding of our conversation." (Complaint, Attachment 12). Atkinson clarified that there was some evidence that at least one other person thought Lapides had made some inappropriate remarks and another said that "with some things said in class he understood some women being offended." (Id.). Atkinson assured Plaintiff that his rights were protected; that the investigation was performed "discreetly and confidentially in a timely manner," and that Atkinson "only spoke to those persons who were part of the investigation." (Id.).

> Plaintiff met with Mescon, Joyce and Atkinson on September 22, 1997, at which time [Plaintiff] reiterated to the administrators that he objected to the manner in which the investigation had been conducted, that KSU administrators had failed to keep the facts of the investigation

> confidential and had disclosed the false charges to students and faculty members who were not involved in the investigation, and that Atkinson wrongfully refused to give [Plaintiff] a fair and unqualified clearance letter. [Plaintiff] requested an apology for this mistreatment.

(Complaint, ¶ 89). Plaintiff alleges that "[t]he administrators' response, shockingly, was that [Plaintiff] would never receive an apology and had better hire a good lawyer and have a lot of money if he intended to pursue the matter." (Complaint, ¶ 90). Atkinson remembered only that Mescon said Plaintiff should be sure he had a good lawyer. (Atkinson depo., pp. 316-17).

Also in September 1997, Plaintiff applied for tenure, to be effective in academic year 1998-1999. (Def. Ex. A, ¶¶ 7, 8, 20, attached documents). Plaintiff prepared and submitted his academic portfolio to the Tenure and Promotion Committee of the Department of Management and Entrepreneurship. (Def. Ex. A, ¶¶ 7, 8, 20, attached documents). The tenure and promotion process employed by KSU at that time, as described in the KSU Faculty Handbook, had at least five necessary levels of review, plus two optional levels. (Def. Ex. A, ¶ 5; Def. Ex. B, PL02228-42). The process called for a faculty member's portfolio to be reviewed by: (1) the department tenure and promotion committee, (2) the respective college or school tenure and promotion committee, (3) the respective college or school dean, (4) the university tenure and promotion review committee (if requested by appeal), (5) the vice president for academic affairs, (6) the university president, and (7) the University System (only if recommended by the university president). (Def. Ex. A, ¶ 5; Def. Ex. B, PL02228-42). During the process, the various tenure and promotion committees and individuals evaluate the

applicant's accomplishments in four areas: (1) teaching effectiveness, (2) institutional service, (3) academic achievement, and (4) professional growth and development. (Def. Ex. B, PL00012-13, PL02228-30).

In 1997, Plaintiff's portfolio was scrutinized at the five levels of review, and all five levels of review recommended that Plaintiff be granted tenure. (Def. Ex. B, D1571). Coles College Dean Timothy Mescon wrote a letter that was particularly supportive of Plaintiff's application for tenure. (Def. Ex. B, D1574-75; Complaint, ¶ 29). Plaintiff received tenure effective August 1998. (Def. Ex. B, D1585).

In January 1998, American International Group. (AIG) entered into a contract with KSU, Hermanson and Plaintiff to produce a newsletter for AIG. (Lapides depo., p. 96). Plaintiff and Hermanson were provided office space to hire an editorial assistant, but then in May 1998, the space was "taken away" and, according to Plaintiff, Mescon did not give him a reason. (Lapides depo., pp. 97-99). Sometime in February 1998, AIG and other entities expressed interest in endowing a corporate governance chair or program, and Mescon stated in an E-mail that "nobody deserves to have a chair more than Dr. Hermanson," or words to that effect, and "ignored" Plaintiff. (Lapides depo., pp. 101-03, 106-07). Because Plaintiff believed that Dean Mescon would not support an endowed chair for Plaintiff, the matter was not pursued. (Lapides depo., pp. 102, 106).

On February 25, 1998,[8] Plaintiff and his attorney met

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[8] The date of this meeting is sometimes identified as February 25, 1998 and sometimes identified as February 28, 1998. (See Complaint, ¶ 92

(continued...)

with Flora Devine, KSU's Assistant to the President for Legal Affairs and in-house counsel, to review records that Plaintiff had requested in an Open Records Act request. (Complaint, ¶ 92). On May 29, 1998, Plaintiff's attorney, Lawrence Burke, wrote a letter to Devine, in which Burke informed Devine that the "hostile work environment concerns expressed to you in our February 1998 meeting" had "gotten significantly worse," and requested her "assistance in dealing with these on-going issues." (Complaint, Attachment 13). Burke did not explain in the May 29, 1998 letter what these concerns were, or how they had worsened. Burke went on to discuss Lunn's "scheme to libel and slander" Plaintiff, in which she attempted "to enroll others, including faculty members . . . with little success." (Id.). Burke also expressed disappointment and concern that Devine and others had "refused to investigate the procedures employed by the Office of Minority Affairs to investigate Ms. Lunn's unfounded allegations." (Id.). Burke wrote, "[i]t is particularly troubling to note that although Mr. Lapides was advised that anti-Semitism might have initiated Ms. Lunn's allegations, no effort was made to question Ms. Lunn about this." (Id.). Burke went on to recount the September 22, 1997 meeting during which Plaintiff "had expected to receive an apology from Ms. Atkinson and Dr. Covin [Joyce] for their treatment of him and the things they said to others about him; a thank you for his cooperation during the investigation, and that they were delighted that the allegations were untrue." (Id.). Instead, Burke contended, Plaintiff "was subjected to a barrage of intimidating statements," and he "was told he would never receive an apology and he better hire a good lawyer and have a lot of money if he intends to pursue this matter further." (Id.). Burke concluded his letter by requesting that Devine "conduct an investigation

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(...continued)
and Attachment 14.) In any event, there was only one meeting.

into the actions of the Office of Minority Affairs, Dr. Covin [Joyce] and others in regard to their investigation of Ms. Lunn's false allegations and the job threats, defamation, and hostile work environment created by their violations of well-established procedures and laws." (Id.).

On June 16, 1998, Devine responded to Burke's May 29, 1998 letter. (Complaint, Attachment 14). Devine wrote that she had not understood from Plaintiff at the February 28, 1998 meeting[9] that he was requesting a formal investigation of the procedures followed in investigating Lunn's complaints. (Id.). Devine wrote, "[n]ow that Professor Lapides has requested an 'investigation', with allegations of 'on-going' issues and a 'hostile' work environment, the University will treat it as a formal request and review the situation." (Id.). Devine reminded Burke that she had expressed her opinion during the February 28, 1998 meeting[10] that "based upon [her] knowledge at that time, . . . there were no legal or procedural violations during the investigation." (Id.). She then wrote that she "would like to know more specifically the nature of Professor Lapides' allegations." (Id.). Devine asked:

> What are the legal or procedural violations during the investigation that Professor Lapides is referring to? In what ways has he experienced or is experiencing a 'hostile' environment? Who are the persons, and what are their actions or incidents that Professor Lapides can point to as the cause of the 'hostile' environment? When and where did these incidents occur and

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[9] See n 8.

[10] See n 8.

> if there were any witnesses, please provide their names, affiliation with the University, and if known to you, how they may be reached.
>
> As soon as I receive Professor Lapides' responses to these questions and any other specifics, I will be better able to direct a review of the situation.

(Id.)

On or about August 4, 1998, Plaintiff's attorney met with Devine and gave Devine a memorandum, entitled "Rough Draft #1 Preliminary Observations Regarding Melvis Atkinson and the Office of Minority Affairs," which outlined seventeen alleged errors by Atkinson in her investigation of Lunn's complaint. (Pl. SMF, ¶ 146; Joint Depo. Ex. 7; Devine depo., p. 117). Among the alleged errors in Atkinson's investigation were misinforming Lunn about the consequences of filing a false claim; failing to inform the complainant or person being accused of his or her rights; failing to notify Lunn or Plaintiff not to contact each other during the investigation; failing to keep the investigation confidential; failing to instruct others to keep the investigation confidential; improprieties in the letter notifying Plaintiff of the complaint; improprieties in the letter notifying Plaintiff of the results of the investigation; Atkinson's attitude toward Plaintiff; improper documentation of investigation; and Atkinson's disregarding of Plaintiff's request for a meeting with counsel. (Id.) The only reference to anti-Semitism in the memorandum was in paragraph 15, where Plaintiff's counsel wrote that "Atkinson's notes don't report that my client informed her that one of the students in the class suggested to him that Lunn's allegations may have been because my client reminded her of her

ex-husband, that she hated all men, and all Jews." (Id. at PL05486). Plaintiff's counsel also complained that "no further inquiry was made about her motivation to file the complaint." (Id.). Plaintiff's attorney gave Devine the document during a period in which the parties were attempting to "delineate the issues and also to set up an informal session with the dean and the chair" in an effort to informally resolve Plaintiff's complaints. (Devine depo., p. 93). Devine asked Plaintiff's attorney "but if we're going to be involved in informal resolution, do we need this? And he said no. So he took the document back." (Devine depo., p. 93; see also Devine depo., p. 117).

Coles College at KSU has three workload tracks: (1) Teaching-service model-Track A, which requires more teaching and less intellectual contribution than would otherwise be expected, (2) Teaching-scholarship-service model-Track B, which requires a balance of teaching and scholarship, and hence a lower course load, and (3) Teaching-scholarship model-Track C, which requires the highest intellectual contribution and the lowest course load. (Mescon depo., pp. 48-54; Joint Depo. Ex. 41; Def. Ex. B at D59). Faculty in the School of Business Administration can select, subject to approval by the department chair, one of the three workload options. (Mescon depo., pp. 58-62). "[P]art of the department 'chair's responsibility is to see that the mix of workload options selected by the faculty allows the department to accomplish the mission of the School of Business Administration . . .,' which means each chair has to assure some type of balance among his or her faculty regarding faculty workload assignments in each department. ... It is the chair's administrative responsibility to make these assignments." (Mescon depo., p. 62).

When Plaintiff was originally hired at KSU, he was under the A track, which is the teaching-service track. (Joyce depo., p. 216; Lasher depo., pp. 30-31). At some point, Plaintiff was allowed to purchase course releases with some contract money he had, giving him a course load similar to Track B. (Joyce depo., pp. 217-18). When KSU converted to the semester system in the fall of 1998, Joyce notified the faculty that the department would no longer support course releases, and everyone would have to teach his or her specified load. (Joyce depo., p. 218). With the conversion, Plaintiff would have been expected to return to a Track A course load. (Joyce depo., p. 218). However, Plaintiff was moved to Track B in the summer of 1998. Dr. Joyce testified that this decision was reached jointly. (Joyce depo., p. 222). However, Plaintiff testified that he objected to the requirement for refereed publications and the additional course assigned to him, and he spoke to Dean Mescon. (Lapides depo., p. 262).

According to a September 2, 1998 E-mail from Plaintiff to Joyce, he agreed to teach 6 classes per year for a two-year period, but disagreed with the Track B requirement of presenting an article/paper at a competitive refereed conference. (Def. Ex. B at PL06661). Joyce then sent an E-mail to Mescon regarding the disagreement and wrote, *inter alia,* "[i]n essence, Paul is asking to be on a 'B' track model, with one 'free' course release (6 classes per year) + opportunity to buy-out at least one additional course per year. He would also like to do this without being held to the same publication expectation as other 'B' track faculty." Joyce wrote that in the past review cycle, she had given Plaintiff a course release for the corporate governance center and did not hold him to the same standard as she held other faculty on Track B, but that in her opinion, "this has been unfair to other B track faculty who carry tremendous service loads and still

must meet the research requirements (Dorothy, Gary, Debby . . .). Because this is a new evaluation cycle, I feel like I need to rectify the situation now." (Id. at PL06660). When asked if he contended that his performance requirements were different from other professors' requirements on the B track. Plaintiff responded, "I don't know - you know, I don't have personal knowledge of other people's assignments. . . ." (Lapides depo., p. 263).

In August 1998, Joyce had determined that there were too many entrepreneur electives being offered in the spring term, so she moved Plaintiff's only graduate course to the summer term. (Joyce depo., p. 245). Because Plaintiff had made it clear that he did not want to teach during the summer, Joyce asked another professor, Carlotta Roberts to teach the course. (Joyce depo., p. 245). Several of Plaintiff's colleagues expressed to Joyce that they thought Plaintiff should teach the course, and Joyce therefore moved the course to the fall term and allowed Plaintiff to teach it. (Joyce depo., pp. 245-46). The tentative proposed reassignment had no effect on Plaintiff's compensation, benefits or terms of employment. (Lapides depo., pp. 277-78).

Plaintiff applied for promotion to associate professor in August 1998, for the 1999-2000 academic year. (Lapides depo., pp. 271, 274; Def. Ex. B, PL01068, PL01072; Def. Ex. A, ¶ 8). The KSU policy in effect at that time provided guidelines for those seeking "Promotion from Assistant to Associate Professor." (Def. Ex. B, PL02130, PL02231). The policy stated:

> In rare instances where an assistant professor who seeks promotion has not already obtained the doctorate - generally because in this individual's field the doctorate has only recently

> been considered the terminal degree - the assistant professor should show that substantial progress has been made in pursuit of the degree.

(Def. Ex. B, PL02130, PL02231).

On September 11, 1998, Elizabeth Fitzgerald, Ph.D., then chair of the departmental tenure and promotion committee, wrote Plaintiff and explained that the committee would not recommend Plaintiff for promotion at that time because he did not have a terminal degree, and he would have to stay in rank longer than another professor might who possessed a terminal degree. (Def. Ex. B, D1375-76). In her letter, Fitzgerald explained the KSU Faculty Handbook policy:

> Faculty who do not hold an earned doctorate or acceptable terminal degree can generally expect to be in their current rank longer than colleagues with a terminal degree before being granted tenure or promotion of rank.

(Def. Ex. B, D1376).

On September 29, 1998, Devine wrote Plaintiff again confirming the findings and conclusions of the KSU Office of Minority Affairs regarding the Lunn allegations. (Def. Ex. B, PL03765). Again Plaintiff was told in writing that the investigation was concluded and "that the evidence did not support the student's claim of sexually hostile environment in the class." (Id.). Devine also wrote:

> I also want to thank you for your cooperation and assistance during the investigation. I

> apologize for any inconvenience this may have caused you, but I know that as a faculty member and business professional, you can appreciate the importance and necessity of investigating all student complaints.

(Id.) Devine concluded, "[t]his concludes and resolves all issues regarding the student complaint of harassment as well as issues you have raised regarding the investigation and an alleged hostile working environment related to this issue or any other issue." (Id.).

On October 20, 1998, Alan Schlact, then Chair of the Tenure and Promotion Committee for the Coles College of Business, wrote Plaintiff to inform him that the committee would not recommend his promotion due to the fact that Plaintiff did not possess a terminal degree and had not maintained sufficient time in rank. (Def. Ex. B, D1373-74). On November 30, 1998, Mescon, Dean of Coles College of Business, also wrote to Plaintiff, explaining that he would not recommend Plaintiff for promotion because he did not possess a terminal degree, and he had insufficient time in rank. (Def- Ex. B, D1372).

On November 17, 1998, Ken Robinson, Ph.D., another KSU professor, faxed a "draft" memorandum to Mescon dated November 12, 1998. (Complaint, ¶ 125). The memorandum alleged that Plaintiff had an inappropriate conversation with a "former student" of Robinson's regarding Robinson's sexual habits and requested Plaintiff's dismissal. (Complaint, ¶ 125). Mescon reviewed the memo and placed it in a file, but he took no action on it, and he did not share its contents with others, including Plaintiff. (Mescon depo., pp. 149-50).

On November *25,* 1998, Mescon, Devine, Joyce and Terri Lavelle, Mescon's Administrative Coordinator, met with a student, Mindy Buckalew, to discuss her allegations of possible stalking, assault and sexual harassment by Plaintiff, and her concerns for her safety.[11] (Devine depo., pp. 228-30, 240-44; Mescon depo., pp. 157-59). Ted Cochran, KSU Chief of Police, attended a portion of the meeting and advised Buckalew that she should contact the Cobb County Police Department as the alleged incidents took place off campus. (Cochran depo., pp. 50-51). Cochran never formally investigated any complaints by Buckalew, but he obtained the police report Buckalew later filed in Cobb County. (Cochran depo., pp. 22, 25-26).

Around December 1998, Robinson told another professor, Elizabeth Fitzgerald, Ph.D., that he had a student who was disturbed about something and that she might be more comfortable talking to another woman. (Fitzgerald depo., pp. 14-15). Buckalew and Robinson were having a romantic relationship at the time, but Fitzgerald was not aware of this. (Fitzgerald depo., p. 52). Soon thereafter, Buckalew contacted Fitzgerald about her claims of sexual harassment by Plaintiff. (Fitzgerald depo., p. 15; Lapides depo., pp. 165-66). Buckalew spoke to Fitzgerald several times about her concerns and set up meetings to discuss her options, but Buckalew failed to show up. (Fitzgerald depo., pp. 17-21). Buckalew never filed a complaint with KSU. (Buckalew depo., pp. 102-03, 105, 113,232-33).

On December 31, 1998, Buckalew went to the Cobb County Police Department and filed a complaint against Plaintiff alleging that she had received phone calls from Plaintiff that

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[11] Vice President for Academic Affairs Edwin A. Rugg and KSU President Betty Siegel were later made aware of the meeting. (Rugg depo., pp. 309-10; Siegel depo., p. 185).

were sexual in nature, that Plaintiff assaulted her, and that he put a gun in her mouth. (Buckalew depo., pp. 16-17; Joint Depo. Ex. 24). The Cobb County Police were unable to substantiate Buckalew's claims and the case did not proceed. (Id.).

Buckalew later signed an affidavit stating that at the November 25, 1998 meeting, the KSU faculty and administrators present attempted to pressure her into filing a complaint, and that she was mistaken in identifying Plaintiff as the man who assaulted her. (Complaint, Attachment 16). Buckalew testified in her deposition that a private investigator, Dianne Pendleton, prepared her affidavit and threatened her with arrest and prosecution for filing a false police report if she did not sign the affidavit that Pendleton had prepared. (Buckalew depo., pp. 119, 125-26). When asked if she would have signed the affidavit in its present form without threat of arrest, Buckalew testified she would not. (Buckalew depo., pp. 114-15). When asked if the statement in her affidavit, "I felt like I was being backed into a corner with no way out," was true, Buckalew responded, "[i]t's a bit of an exaggeration, but it's still true." (Buckalew depo., p. 195). When asked if the statement in her affidavit that it was her "opinion that the faculty group was more interested in getting a complaint about Professor Lapides than they were about finding the truth," was something Buckalew had said to Pendleton, Buckalew responded "no," and she also testified, "[t]hat's not correct because I think they were looking for whatever the truth was." (Buckalew depo., pp. 133-35).

On December 29, 1998, Plaintiff's attorney, Mr. Burke, sent a letter to KSU President Betty Siegel, Ph.D. (Complaint, Attachment 18). Burke requested an investigation into the Office of Minority Affairs' handling of the Lunn complaint, and also requested "a formal investigation into the job threats,

defamation, and hostile work environment which Professor Lapides has been experiencing since the University's investigation of this matter." (Id.). Burke wrote that they had requested a letter which 1) confirmed that none of the complaining student's allegations were supported by anyone else or by other evidence, and 2) apologized "for the errors made during the investigation and the negative impact they have had on my client's reputation." (Id.). Burke also requested "a commitment from the University to stop the job threats, defamation, and hostile work environment Professor Lapides is experiencing at the hands of his supervisor, Dr. Teresa Covin [Joyce], and others." (Id.) Burke questioned whether the animosity toward Plaintiff may have prevented a "fair and impartial" consideration of his promotion. (Id.). Dr. Siegel testified that if she received the letter, "it was read quickly and given to Flora Devine to whom it was copied," and that she did not read the 100 or more pages of documents attached to the letter. (Siegel depo., pp. 149-50, 217-19).

With three levels of review withholding favorable recommendations from Plaintiff, Vice President for Academic Affairs Dr. Edwin A. Rugg decided it would be prudent to request that the University Tenure and Promotion Review Committee review Plaintiff's portfolio. (Def. Ex. B, D1371). The university-wide committee reviewed the recommendations and Plaintiff's portfolio, and on February 3, 1999, Dr. Grashof, Chair of the University Tenure and Promotion Review Committee, informed Plaintiff in writing that the committee "noted [Plaintiff's] record of significant accomplishments" but concluded that "[p]ersons not having the terminal degree can expect to be at the rank of Assistant Professor longer than colleagues who have the [terminal] degree." (Grashof letter attached to Def. Ex. A). Grashof noted that Plaintiff's

contributions were "not yet at a level to support promotion to Associate [Professor] with 6 years in rank at [KSU]." (Id.).

On February 9, 1999, Rugg informed Plaintiff in writing that his lack of a terminal degree was "a significant deficiency in academic achievement relative [to his peers at the associate professor level]" and that "[i]n order to compensate for that deficiency, faculty . . . [would be] expected: 1) to make valuable and highly effective contributions in the teaching and service and/or scholarship areas; 2) to remain in rank longer than colleagues with terminal degrees before being promoted; and 3) to be ineligible for promotion to full professor." (Def. Ex. B, D1369-70). Rugg did not recommend that Plaintiff be promoted. (Id.).

The relevant committees and administrators considered and reviewed the portfolios of twenty faculty members, including Plaintiff's, who were seeking promotion from assistant professor to associate professor for the academic year 1999-2000. (Def. Ex. A, ¶¶ 13-16, attached documents). Five of the seven applicants who were denied promotion, including Plaintiff, did not hold doctoral degrees. (Def. Ex. A, ¶¶ 13-16, 20, attached documents). The other two applicants who were denied promotion held doctoral degrees, but were denied promotions on other grounds. (Id.). For the five who did not hold doctoral degrees, the lack of a terminal degree was a central factor in each of the denials, and each was informed in substantially the same manner as Plaintiff that his or her "lack of an earned terminal degree constitute[d] a significant deficiency in academic achievement relative [to his or her peers at the associate professor level]." (Id.).

On March 12, 1999, Rugg sent a memorandum to

Plaintiff in an attempt to resolve the ongoing dispute over the closed Lunn investigation. (Complaint, Attachment 20). Rugg specifically addressed eight (8) issues raised by Plaintiff. (Id.). First, with regard to the Lunn complaint, Rugg wrote "[a] formal written complaint, alleging sexual harassment by you was submitted. . . . A review of that complaint was conducted . . . university administrators agreed that there was insufficient evidence to support the student's claim. This case was resolved in your favor." (Id.). Rugg added, "[a]ll of us must respect the right of the student to file her complaint and accept the university's obligation to review and respond to that complaint. (Id.)

Second, Rugg addressed the issue of "alleged flaws" in the administrative review: "[y]ou claim to have a long list of alleged and documented 'flaws' in the administrative review of Lunn's complaint. Unless you are willing to share your written list and supporting documentation with us ...your informal and ambiguous complaints in this regard cannot be taken seriously." (Id.).

Next, Rugg responded to Plaintiff's assertion that he should have been cleared in a more favorable manner. (Id.). Rugg explained that KSU could not offer full exoneration, and that the Atkinson clearance letter was designed to remind Plaintiff that he should be more vigilant in guarding against sexual harassment and to offer "feedback as to how [his] behavior might have been interpreted as offensive and inappropriate." (Id.). Rugg also reminded Plaintiff that "your department chair has talked with you previously about another complaint (informal) of a similar nature that was brought to her attention by a student but not pursued formally." (Id.).

Next, Rugg addressed Plaintiff's request for an investigation into what he alleged was a hostile work environment in his department. (Id.). Rugg wrote that "[s]imply having a complaint about alleged hostility is not a sufficient justification for a hearing," and that "a formal written complaint with supporting rationales and documentation" must be submitted. (Id.). Rugg reminded Plaintiff that the alleged hostile work environment must be based on or related to unlawful discrimination. (Id.).

Next, Rugg responded to Plaintiff's informal charges against his department chair and request for an investigation. (Id.). Rugg reminded Plaintiff that no charge had been filed, and asked Plaintiff to make a formal written charge with supporting documentation so that it could be handled properly. (Id.). Rugg then reminded Plaintiff that it is important that the department chair and dean be able to evaluate him and attempt to resolve his complaints without the constant threat of legal action or the insertion of Plaintiff's personal attorney in the process. (Id.). Next, Rugg addressed Plaintiff's insinuation that his department chair had not properly investigated Plaintiff's reports of alleged student complaints about other faculty. (Id.). Rugg counseled Plaintiff that without firsthand complaints from the students, it was appropriate for the chair not to pursue the matters. (Id.).

Finally, Rugg again explained that Plaintiff's denial of promotion to the position of associate professor was based on a six-level review process (including optional review by the University Tenure and Promotion Review Committee), all of which determined that without a terminal degree, Plaintiff should not be recommended for promotion in 1999-2000. (Id.). Rugg went on to express his concern that Plaintiff's working relationships with supervisors and colleagues was deteriorating

and not meeting expectations, and advised that Plaintiff needed to show substantial improvement in these areas soon. (Id.).

In Plaintiff's Performance Evaluation for 1998, which was given to Plaintiff March 19, 1999, Dr. Joyce rated Plaintiff "above expectations" in teaching effectiveness and institutional, scholarly and professional service, and "at expectations" for intellectual contributions.[12] (Def. Ex. B, PL06058-60). His overall rating was "above expectations." (Def. Ex. B, PL06058-60). In the "intellectual contributions" section, Plaintiff was cautioned that if he did not publish at least one refereed, competitive journal article, or present at least two competitive, refereed conference papers by December 31, 1999, his rating in this area would be "below expectations," and he would be asked to move to the "A" track model for the 2000-2001 review cycle. (Id.).

KSU President Siegel sent a letter to Plaintiff's counsel on August 23, 1999 indicating that "[i]t is unfortunate that the attempts of informal resolution . . . have not been successful." (Joint Depo. Ex. 63). Siegel suggested that Plaintiff might seek a hearing under the University's Faculty Grievance Procedures. (Id.). She also wrote that "[p]erhaps a more detailed statement of the alleged incidents that are the basis of Mr. Lapides[']' complaint would lead to a quicker resolution of this matter." (Id.). Siegel "remain[ed] hopeful of an informal resolution that would be in the best interests of both Mr. Lapides and the University." (Id.)

On October 15, 1999, KSU representatives, Rugg, Mescon, Joyce and Devine unsuccessfully engaged in mediation

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[12] Plaintiff had received "above expectations" in this area in previous evaluations. (See Joint Depo. Exs. 66-70).

with Plaintiff and his attorneys in an attempt to resolve Plaintiff's continued complaints and allegations. (Complaint, ¶ 180).

In 1999, Plaintiff was a finalist for KSU's Distinguished Service Award, jointly with Hermanson, as a "collaborative team." (Complaint, ¶ 27).

In January 2000, Plaintiff became ill, and pursuant to doctor's instructions, missed three weeks of classes. (Complaint, ¶ 193; Joint Depo. Ex. 57). Mescon and Joyce sent a memo to Plaintiff on January 20, 2000 regarding "Failure to Meet Course Load Obligation." (Joint Depo. Ex. 56). Mescon and Joyce recounted that they had had "several conversations and extensive correspondence" about Plaintiff's 1999-2000 course load. (Id.). The memo stated, "[a]s agreed upon, and by your choice of the 'B' track course load model, you were to teach a total of **seven** classes during this academic year." (Id.)(emphasis in original). According to the memo, because Plaintiff had taught three classes during the Fall term, and had originally asked to purchase two course releases, he had been scheduled to teach two classes during the Spring term. (Id.). Because Plaintiff informed them in October 1999 that he only intended to purchase one course release, he was assigned an additional course to fulfill his teaching obligation. (Id.). The memo then stated:

> On January 10, 2000, one day before your first class meeting, you informed Dr. Joyce that you were unable to teach the additional class you had been assigned. As of this date, you have also failed to transfer any funds for the purchase of a course release.

> It appears that you have not fulfilled the minimum requirements of your course load agreement.
>
> Your actions are unacceptable and unprofessional, and hence will be reflected in your yearly performance review, merit increase and post-tenure review.
>
> We ask that you, contact the Dean's secretary . . . immediately to arrange an appointment to discuss these issues.

(Id.). When Plaintiff returned to work on January 31, 2000, Plaintiff was informed by Mescon and Harry Lasher, who had become interim Chair of the Department of Management as of January 1, 2000, that he was being reassigned to a forty-hour per week administrative job in Student Advisement because he had missed twenty percent (20%) of his classes for the semester. (Complaint, ¶ 200). Plaintiff complained that any such reassignment "was motivated by anti-Semitism and retaliation." (Complaint, ¶ 207). Thereafter, the planned reassignment was rescinded, and Plaintiff was allowed to continue teaching without being reassigned to administrative duty. (Mescon depo., p. 292).[13]

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[13] Although Plaintiff alleges in his Statement of Material Facts that :[a]t a February, 2000 Coles College Executive Committee Meeting, a statement was made that Lapides would be punished for his absences," [Pl. SMF, ¶ 187), Plaintiff provides no record support for this allegation. His Complaint, ¶ 210, merely states that "on information and belief" several faculty members were told that Plaintiff had refused to teach a class and would be punished, and in his Affidavit, ¶ 17, Plaintiff stated that Professor Steve Smalt told Plaintiff that another professor told Smalt that

(continued...)

During his February 2000 performance evaluation Plaintiff told Joyce and Lasher that he was concerned for his safety, although he did not say who was threatening him. Lasher took no action. (Lasher depo., pp. 57-58). Plaintiff informed KSU police department that he believed Professor Ken Robinson was a threat, and that Robinson should be investigated. (Def. Ex. B, PL7159, PL6581-82, PL6588-89, PL6591-93, PL7173-74, PL7176-77). Plaintiff testified that he was unsure of what action should have been taken against Robinson, or what action could have legally been taken against Robinson, other than some type of investigation: "I believe the law required them to do something, . . ." (Lapides depo., p. 278).

In March 2000, Dr. Lasher reassigned Plaintiff to Track A based on the department's needs and the fact that Plaintiff was originally hired under Track A (Lasher depo., p. 39). Lasher allowed Plaintiff another year on Track B to finish his research. (Lasher depo., pp. 39-41; Def. Ex. B at PL05087-89). Plaintiff alleged in his Statement of Material Facts that he complained that this assignment was "made in retaliation for his complaints of religious discrimination," but "his complaints were ignored. . . ." (Pl. SMF, ¶ 87). Plaintiff cites the

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(...continued)

"a statement that I would be punished for this absence was made at an Executive Committee meeting attended by Dean Mescon, Professors Joyce . . . and other [sic]." This statement does not create an issue of fact. It is inadmissible hearsay, and it does not even identify the person who allegedly made the remark. (Pl's Testimony Appendix, Ex. A). See Fed.R.Evid. 801(c) and 802; see also Macuba v. DeBoer, 193 F.3d 1316, 1324-25 (11th Cir. 1999) (unless proffered hearsay falls within one of the "hearsay exceptions," it is inadmissible and cannot be considered to defeat summary judgment).

deposition testimony of Dr. Fatehi, at pages 36-37, in support of this contention, but Fatehi's testimony does not provide such support.

In 2000, Plaintiff received KSU's Distinguished Service Award jointly with Professor Hermanson as a "collaborative team." (Complaint, ¶ 28).

On March 9, 2000, Plaintiff filed a lawsuit in Cobb County Superior Court, naming as defendants the University System and several of its administrative officials. (Def. Ex. D)("Lapides I"). Lapides I was removed to federal court on April 13, 2000. (Def. Ex. E). On September 8, 2000, the federal law claims against the individual defendants were dismissed due to the defendants' qualified immunity, and on January 24, 2001, the state law claims against the individual defendants were dismissed due to the defendants' official immunity. (Def. Ex. F, at pp. 16-21; Def. Ex. G, at p. 5). With respect to the claims against Defendant, this court held that Defendant had waived its Eleventh Amendment immunity by removing the case to federal court. (Def. Ex. F, pp. 10-16). The Eleventh Circuit reversed, Lapides v. Bd. of Regents of the Univ. System of Georgia, 251 F.3d 1372 (11th Cir. 2001), and the Supreme Court granted *certiorari.* In Lapides v. Bd. of Regents of the Univ. System of Georgia, 535 U.S. 613, 617 (2002), the Supreme Court reversed the Eleventh Circuit and held further that the § 1983 claim against the state, i.e. Defendant, could not be sustained because the state is not a "person" for purposes of § 1983. The remaining state law claims against the University System were subsequently remanded to the Superior Court of Cobb County on August 14, 2002. (Def. Ex. I). On or about November 11, 2002, Plaintiff voluntarily dismissed without prejudice all remaining state law

claims in Lapides I. (Def. Ex. J).

While Lapides I was proceeding, Plaintiff signed a charge of discrimination with the Georgia Commission on Equal Opportunity (GCEO) on August 29, 2000, and it was received by the GCEO on September 1, 2000. (Complaint, Attachment 1). In his charge, Plaintiff alleged that he had been discriminated against on the basis of his sex and religion, and retaliated against for making "an internal protest of religious and gender discrimination" on or about August 11, 1997. (Id.). Plaintiff alleged that he was retaliated against by being involuntarily reassigned to a different career track on February 29, 2000. (Id.). The charge was also signed by Plaintiff's counsel, Lawrence Burke. (Id.). Plaintiff received a right-to-sue letter on June 26, 2001. (Complaint, ¶¶ 7-8, Attachment 2). On September 24, 2001, Plaintiff filed the instant lawsuit [Doc. 1](Lapides II), alleging only Title VII claims based on religion and retaliation.

IV. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "According to the Supreme Court:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

> establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

Young v. General Foods Corp., 840 F.2d 825, 828 (11th Cir. 1988) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986)), cert. denied, 488 U.S. 1004 (1989). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (quoting Anderson v. Liberty Lobby. Inc., 477 U.S. 242 (1986)).

In determining whether the moving party has demonstrated that a genuine issue of material fact exists in a case, the court views the evidence and all facts in the case in the light most favorable to the party opposing the motion. See Frederick, 246 F.3d at 1309; Rollins v. TechSouth. Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Thrasher v. State Farm Fire & Casualty Co., 734 F.2d 637 (11th Cir. 1984). If the party seeking summary judgment meets the initial burden of demonstrating that there is no genuine issue of material fact, the burden then shifts to the non-moving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991), cert. denied, 506 U.S. 952 (1992). "A nonmoving party, opposing a motion for summary judgment supported by affidavits[,] cannot meet the burden of coming

forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial." Id. (citation omitted). The evidence "cannot consist of conclusory allegations or legal conclusions." Id. (citation omitted). Furthermore, unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. See Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 714 (11th Cir. 1984).

V. Discussion

A. Whether Plaintiff's Claims are Barred by Res Judicata

Defendant argues that Plaintiff's Title VII claims are barred by res judicata because Plaintiff previously sued Defendant based on the same allegations he makes now and could have pled the claims he raises now in that prior lawsuit but failed to do so. (Def. Br., p. 3).

In Lapides I, Plaintiff named as Defendants the University System as well as individual administrative officials. (See Def. Ex. D). Plaintiff alleged that KSU officials placed allegations of sexual harassment against him in his personnel files in violation of Georgia and federal law (42 U.S.C. §1983). (Def. Ex. D, ¶¶ 7-27). Plaintiff alleged many of the same facts as he alleges in the instant lawsuit, including the allegedly inadequate investigation of one or more student sexual harassment complaints against Plaintiff and the placement of allegedly false material in Plaintiff's KSU files. (Id.). Plaintiff alleged in Lapides I that he was denied positions on corporate boards of directors or advisors; that he was denied other opportunities; and that his "employment at KSU was threatened,

he was turned down for promotion and he received a disproportionately lower raise than other individuals similarly situated." (Def. Ex. D, ¶¶ 9, 18). Plaintiff did not allege a Title VII claim. (Def. Ex. D). However, he stated that "concurrent with the filing of this complaint, Plaintiff is also filing a complaint with the Equal Employment Opportunity Commission based upon claims of disparate and discriminatory treatment against him on the basis of religion, gender and for retaliation. Upon the receipt of the appropriate authorization, it is anticipated that these claims will be added to the within and foregoing complaint as an amendment." (Def. Ex. D, ¶ 27).

As noted above, the district court in Lapides I dismissed the federal and state law claims against the individual defendants on qualified immunity and official immunity grounds (see Def. Exs. F, G). As for Defendant, the Supreme Court held, in Lapides v. Bd. of Regents of the Univ. System of Georgia, 535 U.S. 613 (2002), that "this case does not present a valid federal claim against the State [i.e., Defendant, the University System]," because the state is not a "person" for purposes of a § 1983 claim for monetary damages. Id. at 617. The district court remanded the remaining state law claims against the University System to the Superior Court of Cobb County, and Plaintiff voluntarily dismissed those claims without prejudice. (See Def. Exs. I, J).

1. Analytical Framework for Res Judicata Defense

The doctrine of res judicata, or claim preclusion, "will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same." Jang v.

United Techs. Corp., 206 F.3d 1147, 1149 (11th Cir. 2000). "Importantly, this bar pertains not only to claims that were raised in the prior action . . . , but also to claims that could have been raised previously." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1187 (11th Cir.), cert. denied, ____U.S.____, 124 S.Ct. 568, 157 L. Ed. 2d 430 (2003). "In determining whether the prior and present causes of action are the same, we must decide whether the actions arise 'out of the same nucleus of operative fact, or [are] based upon the same factual predicate." Id. (quoting In re Piper Aircraft Corp., 244 F.3d 1289, 1297 (11th Cir.), cert. denied, 534 U.S. 827 (2001).

2. Application to Instant Case

Plaintiff argues that his claims are not barred by res judicata because he could not have included the Title VII claims in his first lawsuit as he had not received a right-to-sue letter when he filed that suit. Plaintiff also contends that he could not have sought a stay in the District Court when he received his right-to-sue letter in order to amend his complaint because "[t]he instant Title VII lawsuit was filed while the appeal of the immunity defense issue was pending in the first lawsuit," and "[t]hus, the mandate for the claim against the Board of Regents was no longer in the District Court. . . ." (Pl. Br., p. 8). Plaintiff also argues that there has not been a final judgment against Plaintiff on the merits because the state law claims against the Board of Regents were remanded to the state court, where they were voluntarily dismissed without prejudice. (Pl. Br., pp. 8-9).

It appears that Plaintiff has conceded that the prior decision was rendered by a court of competent jurisdiction; that the parties were identical in both suits; and that the prior and present causes of action are the same, and the undersigned so

concludes. Thus the only remaining questions are whether Plaintiff could have brought his Title VII claims in his previous action and whether there was a final judgment on the merits in the first case.

a. Whether Plaintiff Could Have Brought Title VII Claims in Previous Action

Courts, including the Eleventh Circuit, have repeatedly rejected Plaintiff's argument that res judicata does not bar a subsequent Title VII action where the plaintiff has not obtained a right-to-sue letter. See, e.g. Jang, 206 F.3d 1147. In Jang, the plaintiff filed a complaint raising several claims, including violations of the Americans with Disabilities Act ("ADA") and the Florida Civil Rights Act, and breach of contract. Id. at 1148. The district court granted summary judgment against the plaintiff on the ADA claim because the plaintiff did not have a right-to-sue letter; on the Florida Civil Rights Act Claim because it was time-barred; and on the breach of contract claim because it was insufficient as a matter of law. Id.

The plaintiff then filed a second suit in federal court against the same defendant which "included an almost verbatim copy of the ADA and the Florida Civil Rights Act claims from" the first complaint. Id. The district court granted the defendant's motion to dismiss or for summary judgment on res judicata grounds. Id. at 1148-49. The Eleventh Circuit rejected the plaintiff's argument that he could not have raised his ADA claim in the first lawsuit because he had tried to obtain a right-to-sue letter before filing the first complaint, but was unable to do so. Id., at 1149. The court noted that "[a]t least three other Circuits had rejected similar arguments and held that plaintiffs may not split causes of action to bring, for example, state law claims in

one suit and then file a second suit with federal causes of action after receiving a 'right to sue' letter." Id. (citing Heyliger v. State Univ. & Cmty. Coll. Sys. of Tenn., 126 F.3d 849, 855-56 (6th Cir. 1997) (noting that plaintiff had duty to request right to sue letter and amend state complaint), cert. denied, 522 U.S. 1117 (1998)); Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 339 (7th Cir. 1995) (explaining that plaintiff could not split causes of action and bring a federal claim later); Woods v. Dunlop Tire Corp., 972 F.2d 36, 41 (2d Cir. 1992) (stating that plaintiffs may avoid claim preclusion by filing their other claims and seeking a stay to await the Title VII administrative proceeding or by filing the other claims and then amending after obtaining the right to sue letter), cert. denied, 506 U.S. 1053 (1993)). See also Rivers v. Barberton Bd. of Educ., 143 F.3d 1029, 1032 (6th Cir. 1998) (affirming application of res judicata to bar a suit involving a Title VII claim after the court had dismissed a factually related federal claim on the merits in a prior suit between the parties); Robinson v. Dist. of Columbia, No. 99-1694 (RWR), 2000 U.S. Dist. LEXIS 14476, at *8-9 (D.D.C. Sept. 30, 2000) ("As every court of appeals to have addressed the issue has held, the pendency of an EEO complaint in the administrative process does not alter the res judicata effect of a previously adjudicated civil action based on the same set of facts.").

Lapides I and this action, Lapides II, arise, out of the same nucleus of operative fact, namely, the investigation of Laurie Lunn's sexual harassment complaint and the aftermath of that investigation. When Plaintiff filed Lapides I, he asserted that he was concurrently filing a charge with the EEOC alleging religion and gender discrimination and retaliation, and that upon receipt of the appropriate authorization, he anticipated amending his complaint. (Def. Ex. D, ¶ 27). Plaintiff did not sign a charge

until August 29, 2000, however, and his charge was received by the Georgia Commission on Equal Opportunity (GCEO) on September 1, 2000. (See Complaint, Attachment 1). Plaintiff received a right-to-sue letter on June 26, 2001, during the pendency of Lapides I.

Although Plaintiff might have been unable to amend his complaint in Lapides I, or to have the case stayed while it was on appeal to the Eleventh Circuit and United States Supreme Court, Plaintiff has not explained why he did not file his administrative charge earlier, or seek a right-to-sue letter earlier, or seek to stay the case upon filing it so that he could obtain the right-to-sue letter in order to prevent the splitting of actions which should have been brought together. Plaintiff's failure to obtain the right-to-sue letter until after a point at which it might have been procedurally impossible to stay the case or amend his complaint is no different from the predicament of those plaintiffs who failed to obtain the right-to-sue letter until after a point at which they could not stay the case or amend their complaint because the complaint had been dismissed. Accordingly, the undersigned finds that Plaintiff has not shown that he could not have brought his Title VII claims in the prior lawsuit.

b. Final Judgment on the Merits

Plaintiff argues that because there was not a final judgment on the merits of the state law claims against Defendant in Lapides I, because Plaintiff voluntarily dismissed those claims without prejudice, res judicata does not bar the instant lawsuit. In Jang, however, the court found that res judicata barred the subsequent lawsuit where the district court granted summary judgment "on the merits" in the first lawsuit "with respect to at least the Florida Civil Rights Act and the breach of contract

claims." Jang, 206 F.3d at 1149 (emphasis added). Furthermore, the court declined to address whether the dismissal of Plaintiff's ADA claim in the first lawsuit due to Plaintiff's failure to obtain the right to sue letter was "on the merits," thus indicating that res judicata applies even in the absence of a determination that judgment was entered on all claims on the merits.

In Lapides I, the Supreme Court's dismissal of the federal claim against Defendant under §1983, which arose from the same set of facts as the instant lawsuit, was a final judgment on the merits[14] as to that claim and as to Defendant. The fact that, after the Supreme Court's decision, the state law claims against Defendant were remanded to the Superior Court of Cobb County and subsequently dismissed does not distinguish this case from the rule of Jang. Accordingly, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED** as to all of Plaintiff's Title VII claims as barred by res judicata. Out of an abundance of caution, however, the undersigned will address the parties' remaining arguments.

B. Whether Some of Plaintiff's Claims are Barred for Failure to Raise in GCEO Charge

Defendant argues that all of Plaintiff's claims, other than his claim regarding his February 29, 2000 track reassignment, are barred due to his failure to raise them in the charge he filed

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[14] Moreover, counsel for Plaintiff conceded at the oral argument on Defendant's Motion for Summary Judgment that there was a decision on the merits of the § 1983 claim.

with the Georgia Commission on Equal Opportunity (GCEO")[15] and thereby exhaust his administrative remedies as to these other claims. (Def. Br., p. 16).[16] "The purpose of this exhaustion requirement is that the [EEOC] should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts.'" Gregory v. Ga. Dep't of Human Res., No. 03-10241, 2004 U.S. App. LEXIS 149 at *6 (11th Cir. Jan. 7, 2004)(quoting Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 929 (11th Cir. 1983)). The court explained further "[i]n light of the purpose of the EEOC exhaustion requirement, we have held that 'a plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Gregory, 2004 U.S. App. LEXIS 149 at *6-7 (quoting Alexander v. Fulton County, Ga., 207 F.3d 1303, 1332 (11th Cir. 2000)(internal quotation and citation omitted) overruled in part on other grounds. Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003)). The proper test for determining whether Plaintiff's discrimination and retaliation claims fall within the scope of his EEOC charge is "whether [his] complaint was like or related to, or grew out of, the allegations contained in [his] EEOC charge." Gregory, 2004 U.S. App. LEXIS 149 at *7.

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[15] The GCEO is an administrative agency with which public employees, i.e., those persons employed "by any department, board, bureau, commission, authority, or other agency of the State of Georgia," may file complaints of unlawful employment practices. See O.C.G.A. §§ 45-19-21, 22, 24, and 36. The GCEO is a deferral agency under 42 U.S.C. § 2000e-5(c)-(e). See O.C.G.A. § 45-19-27(16). The GCEO must be given an opportunity to act on charges filed by public employees before such charges are considered by the EEOC.

[16] Defendant's charge is found at Def. Ex. B, ¶4, Discovery Docs. D4.

Although Plaintiff's GCEO charge only set forth the February 2000 track reassignment as a retaliatory act, Plaintiff filed two intake questionnaires with the GCEO (Pl. Ex. E at PL05507-18) which provided much greater detail about Plaintiff's claims, including several other alleged acts of retaliation, e.g., "reassignment, denial of promotion, hostile work environment, defamation. . . ." (Pl. Ex. E at PL05511). Given the allegations of a discriminatory and retaliatory hostile work environment made by Plaintiff in his intake questionnaire, it seems likely that a GCEO investigation "would have reasonably uncovered" those same allegations and determined if there was any evidence to support them. See Gregory, 2004 U.S. LEXIS 149 at *9.

Accordingly, the undersigned will assume, without deciding, that Plaintiff has exhausted his administrative remedies with respect to alleged actions beyond the February 2000 track reassignment in order to address his hostile work environment claim on the merits.

C. Plaintiff's Title VII Religious Discrimination Claim

1. Analytical Framework

Title VII provides that "[i]t shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(l). The term "religion" is defined in the statute as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that

he is unable to reasonably accommodate to an employee's . . , religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

"Employees may utilize two theories in asserting religious discrimination claims: disparate treatment and failure to accommodate." Wilshin v. Allstate Ins. Co., 212 F.Supp.2d 1360, 1370 (M.D. Ga. 2002) (citing Chalmers v. Tulon Co., 101 F.3d 1012, 1017-18 (4th Cir. 1996), cert. denied, 522 U.S. 813 (1997)); see also Breech v. Ala. Power Co., 962 F.Supp. 1447, 1456 (S.D. Ala. 1997) ("[A] plaintiff in a Title VII religious discrimination action has two legal theories available for the prosecution of his claims: 'disparate treatment' and 'failure to accommodate.'") aff'd, 140 F.3d 1043 (11th Cir.), cert. denied, 525 U.S. 846 (1998).

Plaintiff, however, is proceeding on a hostile work environment theory.[17] Plaintiff alleged in his Complaint that he was "subjected to a continuing adverse employment action while similarly situated non-Jews were treated more favorably," (Complaint, ¶ 251), and that "Defendant's continuing conduct created a work environment that a reasonable person would find hostile or abusive and that [Plaintiff] subjectively perceived to be abusive, which altered the terms and conditions of [Plaintiff's] employment but not the terms and conditions of employment of non-Jews." (Complaint, ¶ 253). In Tillery v. ATSI. Inc., No. CV-01-2736-NE, 2003 U.S. Dist. LEXIS 7119, at *28 (N.D.

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[17] In its Motion for Summary Judgment, Defendant analyzed Plaintiff's religious discrimination claim based on disparate treatment with respect to discrete acts of alleged discrimination. In his Response, however, Plaintiff relies on a hostile work environment theory to support his religious discrimination claim. (See Pl. Br., pp. 46-50). The undersigned has analyzed Plaintiff's claim as he has presented it.

Ala. Apr. 14, 2003), the district court acknowledged that "[t]he Eleventh Circuit apparently has not addressed a hostile work environment claim based upon a plaintiff's religion. Even so, this court previously held that the test applied to hostile work environment claims based on other prohibited characteristics . . . is equally applicable to the assessment of a religiously hostile work environment claim." The undersigned will therefore evaluate Plaintiff's claim under established hostile work environment principles.

2. Hostile Work Environment

A plaintiff seeking to establish a hostile work environment claim under Title VII must show:

> (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee . . . ; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002); see also Tillery, 2003 U.S. Dist. LEXIS 7119, at *28-29. Furthermore, "a plaintiff must establish not only that [he] subjectively perceived the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive." Gupta v. Fla. Bd. of

Regents, 212 F.3d 571, 583 (11th Cir. 2000), cert. denied, 531 U.S. 1076 (2001).

a. Protected Class

There is no dispute that Plaintiff was born and raised Jewish and affiliates with the Messianic Jewish movement, and is therefore a member of a protected class.

b. Unwelcome Harassment

In his Complaint, Plaintiff alleged the following actions as harassment:[18] a flawed investigation into a sexual harassment complaint by a former student (Lunn); the issuance of a discriminatory "clearance" letter upon the conclusion of the investigation; threats and intimidation and refusal to investigate Plaintiff's complaints; denial of a promotion; reassignment of a graduate class; assignment to Track B workload requirements; attempted coercion of another student to file a false sexual harassment complaint against Plaintiff; coercion of the same student to file a false police report against Plaintiff for assault; "first ever" mixed performance review; reliance on an uninvestigated and false complaint to justify refusal to clear Plaintiff's record; attempt to reassign Plaintiff to non-teaching position for pretextual reasons; reassignment to Track A workload requirements; refusal to investigate or act on Plaintiff's workplace violence concerns; and refusal to investigate improper conduct of another professor who sought to

[18] As pointed out by Defendant in its Reply [Doc. 105], it is somewhat unclear whether Plaintiff alleges that the same acts form the basis for Plaintiff's hostile work environment claim and his retaliation claim, but the undersigned will assume that they do.

get Plaintiff fired. (Complaint, "Preliminary Statement").

In his Statement of Material Facts, Plaintiff also alleges, *inter alia,* that support for the Corporate Governance Center was withdrawn (Pl. SMF, ¶¶ 77-80); that documents regarding complaints by other female students (Velvet Clay and Mindy Buckalew) were placed in his files without his knowledge in violation of university policy (Pl. SMF, ¶¶ 104, 109-11, 125-27, 153-56, 159); that a course release policy was applied only to Jewish faculty (Pl. SMF, ¶¶ 89-91, 93); that Plaintiff was given "a higher teaching load than any other head of a department center" (Pl. SMF, ¶ 92); that Plaintiff and the other Jewish faculty member in his department have received the lowest faculty increases in the business school since the 1997-98 academic year (Pl. SMF, ¶ 94); that KSU "reneged" on mediation promises (Pl. SMF, ¶ 167-74); and that other employees made inappropriate comments to Plaintiff, such as asking Plaintiff about rumors that he had harassed female students (Pl. SMF, ¶ 164), telling Plaintiff about hearing that Plaintiff "would not be allowed to stay if he continued to pursue this matter," and "strongly suggest[ing] that [Plaintiff] just let this go" (Pl. SMF, ¶ 165), and asking Plaintiff, "[w]hat are you doing here? What is it going to take to get you to quit?" (Pl. SMF, ¶ 166).

3. Because of Religion

Plaintiff has failed to demonstrate that the alleged acts were motivated by religious discrimination. There is no evidence that any person involved in the acts alleged by Plaintiff ever commented on, or made any derogatory statement about Plaintiff's religion. While the evidence shows that Plaintiff may have had conflicts with his Department Chair, Joyce, and with

Dean Mescon, and that these conflicts may have led to some of the actions alleged. Plaintiff has produced no evidence that these conflicts were based on his religion. See, e.g., Mitchell v. Carrier Corp., 954 F.Supp. 1568, 1578 (M.D. Ga. 1995) ("Smith's conflicts with his co-workers, without more, are not sufficient evidence of a hostile work environment."), aff'd 108 F.3d 343 (11th Cir. 1997). Although these incidents, if they occurred, may have been unpleasant, as the Eleventh Circuit has made clear, "'Title VII [ ] is neither a 'general civility code' nor a statute making, actionable the 'ordinary tribulations of the workplace.'" Gupta, 212 F.3d at 587 (citation omitted). "Title VII does not prohibit 'harassment' in and of itself. Rather, demonstrating a 'hostile work environment' based, upon a protected class is one way in which a plaintiff can put forth a claim of [] discrimination. Title VII, however, certainly does not prohibit all behavior an employee may find to be unpleasant or annoying." Hudson v. Norfolk & Southern Railway Co., 209 F.Supp.2d 1301, 1316 n. 19 (N.D. Ga. 2001), aff'd, 01-12398, 2002 U.S. App. LEXIS 5704 (11th Cir. Jan. 8, 2002).

Plaintiff alleges, however, that he was treated less favorably than non-Jewish professors, in an effort to demonstrate that he was being discriminated against on the basis of his religion. First, Plaintiff alleges that he and the other Jewish teaching faculty member in his department "consistently have received the lowest salary increases within the business school." (Pl. SMF, ¶ 94). Plaintiff produces no evidence, other than his conclusory statements in his deposition and affidavit (see Lapides depo., pp. 217-218; Lapides Aff., ¶ 13), in support of this assertion. That is not enough. See Strickland v. Daire, No. 4:01cv153/RV, 2002 U.S. Dist. LEXIS 20230, at *8 (N.D. Fla. Sept. 30, 2002) ("[C]onclusory allegations based on subjective beliefs are insufficient to create a genuine issue of material

fact.").

Plaintiff also alleges with respect to some of the alleged acts of harassment, such as his teaching track, reassignments and the proposed reassignment to administrative duty after missing 20% of his classes, that he was the only faculty member subjected to such treatment. (See Pl. SMF, ¶¶ 88, 183-184). In light of the fact that there are other Jewish faculty members in the College of Business, e.g., Professors Astrachan and Aronoff (see Lapides Aff., ¶ 14; Devine Supp. Aff., ¶¶ 2, 3 and attached Doc. D13), and that these faculty members were not subjected to these actions, Plaintiff's assertions indicate that something other than religion motivated the alleged harassment. Furthermore, the proposed reassignment to administrative duty was not carried out (see Pl. SMF, ¶ 186), and as discussed below, the teaching track reassignments were not sufficiently adverse to constitute acts of harassment.

Plaintiff also alleges that a new course release policy "applied only to Jewish faculty members such as Lapides." (Pl. SMF, ¶¶ 91). Plaintiff provided no citation to the record to support that assertion. Although some exceptions to the policy were made (see Fatehi depo., pp. 11-13, 28-29; Brawley depo., p. 41; Lasher depo., pp. 45-46, 81), two of the three professors who received exceptions to the policy were Jewish, Professors Astrachan and Aronoff. (Fatehi depo., pp. 11-13, 28-29; see also Lapides Aff., ¶ 14; Devine Supp. Aff., ¶ 2, 3 and attached Doc. D13).

Plaintiff alleges that he was denied a promotion to Associate Professor while Steve Smalt was promoted to Associate Professor, even though Smalt, like Plaintiff, did not have a Ph.D. (Pl. SMF, ¶¶ 96-97). Assuming for the sake of

argument that Smalt is not Jewish, information which Plaintiff does not provide, Plaintiff has not shown that he and Smalt were similarly situated because Smalt, unlike Plaintiff, was working on his Ph.D. when he applied for promotion, and received it after being promoted. (Def. Ex. A, ¶ 11). The KSU policy in effect at the time provided guidelines for those seeking "Promotion from Assistant to Associate Professor." (Def. Ex. B, PL02130, PL02231). The policy stated:

> In rare instances where an assistant professor who seeks promotion has not already obtained the doctorate - generally because in this individual's field the doctorate has only recently been considered the terminal degree - the assistant professor should show that substantial progress has been made in pursuit of the degree.

(Id.). There is no evidence that Plaintiff had made "substantial progress" in pursuit of a Ph.D, and in fact he testified that he had no plans to pursue one. (Lapides depo., p. 276).

Furthermore, Smalt had more time in rank than Plaintiff, and had taught at KSU for 13 years, while Plaintiff had taught for only 6 years at KSU when he applied for promotion. (Def. Ex. A, ¶ 10). As repeatedly asserted by all levels of review which considered Plaintiff's application for promotion, he was denied promotion because he lacked a terminal degree, and because he had insufficient years in rank at KSU to compensate for the lack of a terminal degree. (See, e.g., letters attached to Def. Ex. A; Def. Ex. B, D1369-76). Plaintiff has produced no evidence that his religion was the reason for the denial of his promotion. Although Plaintiff alleges that Dr. Joyce recommended that he apply for promotion (Pl. SMF, ¶ 96) (a

contention Dr. Joyce disputes (see Joyce depo., pp. 151-52, 248)) and then did not support his application, that allegation, even if true, does not demonstrate that he was denied promotion because of his religion.

Plaintiff also alleges that "KSU aggressively investigates complaints against Jewish faculty members, but either does not investigate, or is less aggressive regarding complaints against non-Jews." (Pl. SMF, ¶ 225). Plaintiff cites a memorandum to an instructor named George Berry who "was accused of conduct similar to Lunn's allegations against Lapides . . ." as evidence that "there was simply a file memorandum asking him not to do it again; there was no investigation." (Pl. SMF, ¶ 225).

Plaintiff has seriously mischaracterized the memorandum. (See Pl. Ex. E at PL04761). On April 14, 1998, Patrick Taylor, Chair of the Department of Visual Arts in the College of Arts, Humanities and Social Sciences, wrote a memorandum to Mr. Berry regarding "Student Complaints." (Id.). In the memo, Taylor informed Berry that several of his female students had expressed concerns about inappropriate language and humor, including sexual innuendo and suggestions which made them feel uncomfortable. (Id.). Taylor went on to write, *inter alia,* "[a]s Chair of the Department of Visual Art [sic] I am directing you to cease using such language and inappropriate humor in your classes. Failure on your part to stop using such language and humor, will result in the termination of your association with Kennesaw State University." (Id.) (emphases added). Taylor went on to remind Berry that they had already discussed "the issue of not using inappropriate and sexually suggestive language in classes or around students," and he also attached a copy of the KSU policy on sexual harassment with instructions to "read the policy

carefully." (Id.). The actual language of the memorandum is a far cry from Plaintiff's characterization as simply "asking him not to do it again. . . ." (Pl. SMF, ¶ 225). Furthermore, there is nothing in the memorandum to indicate that an investigation was not performed before the memorandum was written. If an investigation was not performed, it is difficult to see how Plaintiff could consider Berry's treatment more favorable to his own given that Taylor directly accused Berry of engaging in the complained-of behavior, directed him to cease engaging in it, and threatened Berry with termination if he did not.

Plaintiff also cites a notice letter sent to a non-Jewish professor by the EEO officer in which the letter identified the complaining party, stated that the complaints listed were allegations, gave the alleged wrongdoer a copy of the complaint filed by the student, and reminded all parties of their obligation to keep the investigation confidential. (See Pl. Ex. E at PL05200-01). That letter was written by Melvis Atkinson to Robert Kreiner, a part-time instructor of Philosophy on February 8, 1999. (Id.). The undersigned does not find that this letter, written a year and a half after the notice letter at issue in Plaintiff's case, shows that the alleged acts of harassment, most of which were allegedly committed by the Chair of his department and the Dean of the College of Business, were motivated by Plaintiff's religion.

Plaintiff also alleges that there was a pattern of discrimination at KSU. (See Pl. SMF, ¶¶ 213-24) Plaintiff alleges that "during the 1994-95 school years[,] KSU received complaints or was sued by five professors (Candace Kaspers, Bari Levingston, Nadine Koch, Allan Schwartz, and Judy Palmer) for religious discrimination against these Jewish professors and/or retaliation for reporting same." (Pl. SMF, ¶

213). Plaintiff has not produced evidence that shows that these professors were in the College of Business, or that the persons who took the great majority of the actions complained of by Plaintiff, i.e., Dean Mescon and then Chair Joyce, were involved in any way in these other professors' cases. Furthermore, although Plaintiff has produced evidence that Kaspers prevailed at a jury trial on her retaliation claim, Plaintiff has not shown that the other complainants were successful on their discrimination claims.[19] Accordingly, the undersigned finds that the evidence of these other lawsuits or complaints does not demonstrate that the harassment alleged by Plaintiff was because of his religion. See, e.g., Palmer v. Bd. of Regents of the Univ. System of Georgia, 208 F.3d 969, 972-73 (11th Cir. 2000) (holding that the district court did not abuse its discretion in excluding evidence of other lawsuits against the University System where the district court found that evidence of other decision makers' statements or actions in other departments was "too remote to be relevant to the motive here.").

The real thrust of Plaintiff's complaint is that the alleged hostile work environment occurred after he began complaining

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[19] In fact, Professor Palmer's lawsuit was tried by a jury which returned a verdict in favor of Defendant. See Palmer v. Bd. of Regents of the Univ. System of Georgia, 208 F.3d 969, 973 (11th Cir. 2000). Professor Koch's lawsuit (Civil Action File No. 1:96-CV-1458-WCO, United States District Court for the Northern District of Georgia) was tried to a jury, and a verdict was returned in favor of the defendants, including the Board of Regents, and judgment was entered for defendants on September 27, 2000. Professor Schwartz' lawsuit (Civil Action File No. 1:95-CV-1965-WCO) was dismissed on summary judgment on September 26, 1997. Professor Levingston's lawsuit (Civil Action File No. 1:95-CV-2603-WCO) was settled, and dismissed without prejudice on February 26, 1998.

about the investigation into the Lunn complaint against him in 1997, a claim discussed below. In fact, Plaintiff asserted in his brief that "[t]he religious discrimination and retaliation claims were set in motion in 1997 by KSU's flawed investigation complaint against Lapides for allegedly making inappropriate sexual comments in class." (Pl. Br., p. 1). Plaintiff asserts in his Brief that "[p]rior to the incidents at issue in this lawsuit," he received the highest possible ratings in every category on his performance evaluations; he consistently received high praise for his teaching; and received awards from the College of Business for his work with the Corporate Governance Center. (Pl. Br., pp. 18-19). Apparently during that period, Plaintiff was not being discriminated against on the basis of his religion. Thus, it is difficult to perceive how or why Plaintiff's supervisors began discriminating against Plaintiff on the basis of his religion after 1997.[20] In fact, even after August 1997, Plaintiff received tenure, with a very positive endorsement by Dean Mescon, and he was given the Distinguished Service Award in 2000.[21] The observation of the court in Collier v.

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[20] In fact, Plaintiff asserts that "[a]ll of this began to change after [Plaintiff] complained in the Summer of 1997 about the flawed investigation of [Lunn's] sexual harassment complaint. . . ." (Pl. Br., p. 19).

[21] It should also be noted that Dean Mescon testified:

> I am Jewish. I believe the department of management and entrepreneurship is, in fact, highly supportive of Jewish faculty members. It is, in fact, true that all three endowed chairs in the Coles College are held by Jewish faculty at this time, our only eminent scholar chair, now all three eminent scholar chairs. And it is true that many Jewish colleagues in business across the campus

(continued...)

Clayton Co. Cmty. Serv. Bd., 236 F.Supp.2d 1345, 1376 (N.D. Ga. 2002) is pertinent:

> As the same Board that plaintiff now accuses of racial discrimination selected plaintiff over Wiggins originally, it seems more reasonable to infer that the Board made this choice because plaintiff had forfeited their confidence rather than to infer that the Board had suddenly become more bigoted.

The undersigned concludes that Plaintiff has not satisfied his *prima facie* case of hostile work environment based on his religion, and therefore **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED** as to Plaintiff's Title VII religious discrimination claim.

D. Plaintiff's Title VII Retaliation Claim

1. Analytical Framework

Pursuant to 42 U.S.C. § 2000e-3(a), it is "an unlawful employment practice for an employer to discriminate against any . . . employee[ ] . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The participation clause of the statute "protects

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(...continued)

have been tenured, promoted and rewarded.

(Mescon depo., pp. 235-237).

proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC. . . ." EEOC v. Total Sys. Serv., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000); see also Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989) (instigation of statutory proceedings is prerequisite to protection under participation clause).

The opposition clause, on the other hand, protects activity which occurs prior to the filing of a formal charge with the EEOC, such as filing an internal complaint of discrimination with the employer or informally complaining of discrimination to one's supervisors. See Rollins v. Florida Dep't. of Law Enforcement, 868 F.2d 397, 400 (11th Cir, 1989) ("the protection afforded by the statute is not limited to individuals who have filed formal complaints, but extends as well to those, like Rollins, who informally voice complaints to their superiors or who use their employers' internal grievance procedures."). See also Holifield, 115F.3d at 1566.

To establish a *prima facie* case of retaliation under Title VII, in the absence of direct evidence, the plaintiff must show that "(1) [he] engaged in a statutorily protected activity; (2) the employer took an adverse employment action against him; and (3) there is a causal connection between the protected activity and the adverse action. . . ." Berman v. Orkin Exterminating Co., 160 F.3d 697, 701 (11th Cir. 1998). See also Meeks v. Computer Assocs. Int'l, 15 F.3d 1013 (11th Cir. 1994); Donnellon v. Fruehauf Corp., 794 F.2d 598 (11th Cir. 1986). The third prong is satisfied by evidence that the protected action and the adverse employment action are not totally unrelated. Berman, 160 F.3d at 701; Weaver v. Casa Gallardo. Inc., 922 F.2d 1515, 1525 (11th Cir. 1991). "Close temporal proximity between the protected activity and the adverse action may be

sufficient to show that the two were not wholly unrelated." Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1119 (11th Cir. 2001).

If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a non-discriminatory basis for the action. Meeks, 15 F.3d at 1021. If the defendant does so, then "[i]n order to avoid summary judgment, a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that each of the employer's preferred nondiscriminatory reasons is pretextual." Chapman v. A I Transp., 229 F.3d 1012, 1037 (11th Cir. 2000).[22]

2. Plaintiff's Claim

Plaintiff alleges that after he complained of religious discrimination and retaliation and/or hostile work environment, he was subjected to a "continuing and persistent pattern of retaliation." (Complaint, ¶ 248). Plaintiff contends that he "specifically complained no less than five times of religious discrimination," i.e., on August 29, 1997, September 3, 1997, May 29, 1998, August 4, 1998, December 29, 1998, and January 31, 2000. (Complaint, ¶ 248). Plaintiff also contends that he complained "no less than four times of a hostile working environment and/or retaliation," i.e., on February 25, 1998, May 29, 1998, December 29, 1998 and January 2000. (Complaint, ¶ 248). Plaintiff lists numerous acts he contends were taken by KSU officials in retaliation for making these complaints, as

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[22] Retaliation claims under Title VII are also analyzed using the McDonnell Douglas/Burdine burden-shifting framework used to prove disparate treatment cases by circumstantial evidence. See Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 511 n.10 (11th Cir. 2000).

discussed above.

a. Plaintiff's *prima facie* case

(1) Statutorily Protected Activity

The Eleventh Circuit has "recognized that a plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices." Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997). Plaintiff's burden under this standard has both a subjective and an objective component. Id. "A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented." Id. (emphasis in original); see also Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999). "The objective reasonableness of an employee's belief that [his or her] employer has engaged in an unlawful employment practice must be measured against existing substantive law." Id.

The undersigned finds that the August 29, 1997 and September 3, 1997 "complaints" clearly do not constitute protected activity under Title VII because Plaintiff was not complaining about an employment action made unlawful by Title VII. He was simply, at most, complaining that Ms. Lunn might have been motivated by anti-Semitism in making the complaint. (See Def. Ex. B at PL05380; Complaint, ¶¶ 61, 79; Lapides depo., pp. 134-35; Joint Depo. Ex. 82; Joyce depo., pp. 18-19). Ms. Lunn was not an employee or agent of KSU, and her complaint, even if motivated by anti-Semitism, was not an

action made unlawful by Title VII. Therefore, Plaintiff could not have had a good faith, reasonable belief that the employer was engaged in an unlawful employment practice when he suggested that Lunn, a former student, might have been motivated by anti-Semitism.

With respect to the February 1998 complaint, Plaintiff has produced evidence that on February 25, 1998, his attorney. expressed "hostile work environment concerns" to Flora Devine when they met to review records that Plaintiff had requested in an Open Records Act request. (See Complaint, ¶ 92; Complaint, Attachment 13). Plaintiff has not shown that he or his attorney complained of a hostile work environment based on retaliation for opposing conduct on the part of Defendant which Plaintiff, in good faith, reasonably believed was an unlawful employment practice during that meeting, however. Nor has Plaintiff shown that he or his counsel complained of a hostile work environment based on his religion during that meeting. Therefore, the undersigned does not find that the assertion that "hostile work environment concerns" were expressed is sufficient to show that Plaintiff engaged in protected activity during that meeting.

With respect to the May 29, 1998, complaint, Plaintiff's attorney, Mr. Burke, complained to Ms. Devine that the "hostile work environment concerns" previously expressed had "gotten significantly worse," but he did not specify what those concerns were, or what the basis for the hostile work environment was, i.e., retaliation, discrimination, etc. (See Complaint, Attachment 13). Burke requested that an investigation be conducted "into the actions of the Office of Minority Affairs, Dr. Covin [Joyce] and others in regard to their investigation of Ms. Lunn's false allegations and the job threats, defamation, and hostile work environment created by their violations of well-established

procedures and laws." (Id.). Again, Burke did not allege that the hostile work environment was based on Plaintiff's religion or other protected characteristic, or that it was being created in retaliation for Plaintiff having engaged in protected activity (which he had not done at that point).[23] The only reference to religion was Burke's assertion that "[i]t is particularly troubling to note that although Mr. Lapides was advised that anti-Semitism might have initiated Ms. Lunn's allegations, no effort was made to question Ms. Lunn about this." (Id.). Like the August 29, 1997 and September 3, 1997 "complaints," this suggestion that Lunn might have made her complaint of sexual harassment because of anti-Semitism does not constitute protected activity.

The August 4, 1998 complaint (the 17-point memorandum prepared by Plaintiff's attorney; see Joint Depo. Ex. 7) and the December 29, 1998 complaint (the letter to President Siegel prepared by Plaintiff's attorney, Complaint, Attachment 18) suffer the same deficiencies as the May 29, 1998 complaint. The 17-point memorandum listed several alleged errors in the investigation, but did not state that the alleged errors constitute a practice made unlawful by Title VII. The only reference to religion is a reiteration of Plaintiff's complaint that Lunn's motivation, which may have been anti-Semitism, was not investigated. The December 29, 1998 letter to Siegel again requested an investigation into the Office of Minority Affairs' handling of the Lunn complaint, but did not allege that the handling of the complaint was discriminatory. (See Complaint,

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[23] In fact, in her response to Burke's letter, Devine asked Burke, *inter alia*, "[i]n what ways has [Plaintiff] experienced or is experiencing a 'hostile' environment? Who are the persons, and what are their actions or incidents that [Plaintiff] can point to as the cause of the 'hostile' environment?" (Complaint, Attachment 14).

Attachment 18). Burke also requested "a formal investigation into the job threats, defamation, and hostile work environment which [Plaintiff] has been experiencing since the University's investigation of this matter." (Id.). Again, Burke failed to state that the alleged job threats, defamation and hostile work environment were based on Plaintiff's religion or other protected characteristic, or that they are in retaliation for engaging in protected activity.[24] The letter simply stated that these actions had been occurring since the investigation of Lunn's complaint. This assertion is not protected activity as it is not a complaint about a practice made unlawful by Title VII.

Finally, with respect to the January 2000 complaint, Plaintiff has presented evidence that he complained in January 2000 that the proposed reassignment of him to an administrative position for missing 20% of his classes was motivated by anti-Semitism and retaliation. (Complaint, ¶ 207). Plaintiff has not, however, pointed to any evidence of record that would show that at the time he made that allegation, he had a good faith, reasonable basis for believing that the proposed reassignment was motivated by anti-Semitism or retaliation for engaging in protected activity. In the first place, the undersigned has already found that Plaintiff had not engaged in protected activity prior to January 2000. Therefore, he could not have had a good faith, reasonable belief that the proposed reassignment was in retaliation for engaging in protected activity. Secondly, Plaintiff has not presented evidence that he had reason to believe that the proposed reassignment was motivated by anti-Semitism. In his Statement of Material Facts, Plaintiff alleged that "[n]o other tenured professor at KSU has ever been reassigned for missing

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[24] The undersigned finds that up to this point, December 29, 1998, Plaintiff had not engaged in protected activity under either the opposition clause or the participation clause of 42 U.S.C. § 2000e-3(a).

twenty percent (20%), or even more, of his or her classes in a semester due to illness." (Pl. SMF, ¶ 183). Plaintiff cites Defendant's Responses to Plaintiff's Request to Admit Nos. 270, 271 and 273 in support of this assertion. Those citations do not, however, support Plaintiff's allegation. To each of those requests to admit, Defendant responded, "Defendant has made reasonable inquiry and the information known or readily obtainable by it is insufficient, to enable it to admit or deny this request." [See Doc. 74, "Responses of Defendant to Plaintiff's First Requests for Admission"].

Plaintiff asserts in his Statement of Material Facts that Professor Fitzgerald was not reassigned to an administrative position when she missed 20% of her summer session. (Pl. SMF, ¶ 184). He cites to the deposition testimony of Dr. Joyce in support of this contention. However, when asked whether she approved Dr. Fitzgerald "to miss more than 20 percent of her classes during one of the summer sessions without reassignment," Dr. Joyce responded, "I don't recall that I did." (Joyce depo., p. 241). Furthermore, Plaintiff has not shown that he was aware of thus fact, if true, when he complained that his proposed reassignment was anti-Semitic.[25] See Hudson, 209 F.Supp.2d at 1314 where the court observed:

> Also important is the fact that plaintiff has to show that she knew of the behavior at the time she complained, as one cannot oppose behavior of which one is not aware. See Clover, 176 F.3d at 1352 ("What counts is only the conduct that person opposed, which cannot be more than what she was aware of."). Accordingly, in

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[25] There is also evidence of record that Dr. Fitzgerald is of Jewish and Methodist heritage. (Pl. Ex. F at D13)

> regard to her retaliation claim, the Court discusses only that allegedly discriminatory conduct of which plaintiff claimed to have been aware at the time she complained in November. While other conduct discovered later may have been relevant to plaintiff's underlying harassment claim, it is not relevant to the retaliation claim.

Accordingly, the undersigned finds that Plaintiff has not shown that he had a good faith, reasonable belief that the January 2000 proposed reassignment to administrative duties was motivated by discrimination or retaliation, and therefore, finds that Plaintiff did not engage in protected activity in January 2000. Furthermore, as discussed below, the undersigned finds that Plaintiff has not shown that he suffered an adverse employment action as a result of his January 2000 complaint.

(2) Adverse Action

"An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.'" Gupta, 212 F.3d at 587, cert. denied, 531 U.S. 1076 (2001). After Plaintiff made his complaint in January 2000, the decision to reassign him to administrative duty was rescinded and he continued to teach. However, Plaintiff was reassigned, in March 2000, to the Track A teaching track, the track to which he was originally assigned. According to Dr. Lasher, he reassigned Plaintiff to Track A based on the department's needs and the fact that Plaintiff was originally hired

under Track A. (Lasher depo., p. 39). Lasher allowed Plaintiff another year on Track B to finish his research. (Lasher depo., pp. 39-41; Def. Ex. B at PL06087-89).[26] Plaintiff has not shown how this reassignment materially and substantially affected the terms and conditions of his employment, or that he suffered any adverse consequence of the reassignment, such as a decrease in salary or other benefits. Conduct that falls short of an ultimate employment decision must meet "some threshold level of substantiality . . . to be cognizable under the anti-retaliation clause." Gupta, 212 F.3d at 587 (quoting Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998)). Plaintiff has failed to show that his reassignment to Track A meets this threshold. Accordingly, the undersigned finds that Plaintiff has not shown that he was subjected to adverse action after allegedly complaining of discrimination and retaliation in January 2000.

The undersigned concludes that Plaintiff has not made out a prima facie case of retaliation and therefore **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED** with respect to Plaintiff's retaliation claim.[27]

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[26] Plaintiff alleged in his Statement of Material Facts that he complained that this assignment was "made in retaliation for his complaints of religious discrimination," but "his complaints were ignored. . . ." (Pl. SMF, ¶ 87). Plaintiff cites the deposition testimony of Dr. Fatehi, at pages 36-37, in support of this contention, but Fatehi's testimony does not provide such support.

[27] In his Statement of Material Facts, Plaintiff cites several instances of "ongoing retaliation and hostile work environment" from 2000 until 2002. (See Pl. SMF, ¶¶ 199-212). These instances are not set forth in his Complaint, or discussed in his Brief. However, the undersigned finds that these instances, viewed individually or collectively, do not reach the "threshold of substantiality" to constitute an adverse action. See Wideman, 141 F.3d at 1456; see also Gupta, 212 F.3d at 587 (observing that "[i]n evaluating what actions meet that required level of substantiality, we

(continued...)

Summary

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [Doc. 89] be **GRANTED** with respect to all of Plaintiff's claims and that this case be **DISMISSED.** The Clerk is **DIRECTED** to terminate the District Court's referral of this action to the undersigned.

IT IS SO REPORTED AND RECOMMENDED this 13 day of February, 2004.

/s/ Susan S. Cole
SUSAN S. COLE
United States Magistrate Judge

(...continued)
recognize that Title VII[ ] is neither a "general civility code" nor a statute making actionable the "ordinary tribulations of the workplace." ' " [quoting Anderson v. Coors Brewing Co., 181 F.3d 1171, 1178 (10th Cir. 1999)). The undersigned also finds that these actions were not sufficiently severe or pervasive to constitute a hostile work environment. Finally, the undersigned finds that these actions do not constitute adverse employment actions under Title VII's anti-discrimination provision. See Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES,

Plaintiff,

vs.

CIVIL ACTION FILE NO.
1:01-CV-2554-TWT
JURY TRIAL DEMANDED

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Defendant.

VERIFIED COMPLAINT

Plaintiff Paul D. Lapides ("Lapides") files this Verified Complaint for employment discrimination and retaliation under Title VII, and shows the Court the following:

PRELIMINARY STATEMENT

Lapides is a tenured professor at Kennesaw State University ("KSU"). He was born and raised Jewish, and he affiliates with the Messianic Jewish movement. Prior to KSU's religious discrimination and retaliation, Lapides had an excellent reputation in his field. He had received several awards from KSU, and he was a nationally recognized authority on corporate governance.

The religious discrimination and retaliation in this case was set in motion in 1997 by a student's filing of a false sexual hostile environment complaint against Lapides for allegedly

making inappropriate comments in class. KSU conducted a flawed investigation of the complaint, including but not limited to failing to give Lapides a copy of the complaint, identifying the false allegations as true in the notice letter to Lapides, and failing to maintain confidentiality and disclosing the report to students and faculty members who were not part of the investigation. Although KSU ultimately (correctly) concluded that the complaint was not supported by the facts, KSU wrote a letter to Lapides (and put a copy in his personnel file and gave copies of the letter to other administrators and faculty members) that questioned Lapides's professionalism and strongly implied that he had created a potentially sexually hostile environment in his classroom.

After Lapides received the false and defamatory letter from KSU, he specifically complained on at least five occasions that the false complaint and subsequent investigation were motivated by anti-Semitism against him because he was Jewish. KSU's response was to retaliate against Lapides for complaining about unlawful religious discrimination and to create a hostile work environment for Lapides that has continued to the present, including but not limited to:

(a) Threats and intimidation and refusal to investigate Lapides's complaints;

(b) Denial of a promotion;

(c) Reassignment of a graduate class;

(d) Assignment to "Track B" workload requirements;

(e) Attempted coercion of another student to file a false sexual harassment complaint against Lapides;

(f) Coercion of the same student to file a false police report against Lapides for assault;

(g) First ever mixed performance review;

(h) Reliance on an uninvestigated (false) complaint to justify refusal to clear Lapides's record;

(i) Attempt to reassign Lapides to non-teaching position for pretextual reasons;

(j) Reassignment back to "Track A" workload requirements after Lapides had redirected his efforts to accommodate the previous reassignment to "Track B";

(k) Refusal to investigate or act on Lapides's reported workplace violence concerns; and

(l) Refusal to investigate improper conduct (to wit, sleeping with a student and coercing her to file a false police report against Lapides) by a professor who sought to get Lapides fired and whose complaint against Lapides was retained in files discoverable through Open Records Act requests.

KSU's conduct, in discriminating against Lapides and punishing him and retaliating against him for complaining about the discrimination, constitutes a violation of Title VII of the Civil Rights Act of 1964. KSU's conduct is even more egregious because only weeks before KSU began to retaliate against Lapides for complaining about discrimination because he was Jewish, KSU lost a highly publicized lawsuit by another professor at KSU who had been removed as chair of her department in retaliation for her complaints that instructors in her department had been discriminated against because they were Jewish. After the jury verdict, KSU settled this lawsuit for a lump sum payment to the retaliated-against chair in the amount seven hundred fifty thousand dollars ($750,000.00).

KSU's decision to discriminate and retaliate against Lapides, while at the same time refusing to investigate improper conduct by another professor who made false accusations against Lapides and coerced his student-lover to file a false police report

against Lapides, further highlights KSU's improper motives.

So does the decision by the Vice President of Academic affairs to justify KSU's improper conduct by knowingly relying on a fabricated report regarding a prior sexual harassment claim against Lapides and threatening disciplinary action and dismissal against Lapides for not getting along with his supervisors and colleagues when Lapides complained about KSU's discriminatory and illegal treatment of him. The Vice President's criticism of Lapides's alleged inability to get along with his colleagues is particularly suspect in light of the fact that the faculty voted Lapides as a finalist that year, and the winner the following year, of KSU's Distinguished Service Award, and in light of the fact that Lapides had never received such criticism in his annual performance reviews (including the annual performance review for that year).

PARTIES

1. Plaintiff Paul D. Lapides is a citizen of the State of Georgia and a resident of Cobb County, Georgia. He was born and raised Jewish, and he affiliates with the Messianic Jewish movement.

2. Defendant Board of Regents of the University System of Georgia ("Defendant" or "Board") operates the University of Georgia System of Colleges and Universities. The Board is the joint employer of Lapides, the governing body responsible for the overall operation of Kennesaw State University ("KSU"), and the employer of all of KSU's agents.

JURISDICTION AND VENUE

3. As an action to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, this Court has jurisdiction of this case pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1331.

4. Defendant is located in the Atlanta Division of the Northern District of Georgia and has committed the acts complained of in the Atlanta Division of the Northern District of Georgia. Venue is therefore proper in this Court pursuant to 28 U.S.C. § 1391.

CONDITIONS PRECEDENT

5. On or April 4, 2000, in compliance with the requirements of 42 U.S.C. § 2000e-5, Lapides filed with the Equal Employment Opportunity Commission ("EEOC") a complaint against defendant for gender and religious discrimination and retaliation.

6. A true and correct copy of the EEOC complaint is included in the Appendix to this Complaint at Tab 1 and incorporated by reference.

7. On June 26, 2001, the EEOC issued to Lapides a Notice of Right to Sue.

8. A true and correct copy of the Notice is included in the Appendix to this Complaint at Tab 2 and incorporated by reference.

9. Lapides has exhausted his administrative remedies

and has complied with all conditions precedent to the filing of this lawsuit.

FACTS

I. Lapides's Work History and Reputation

10. In 1975, Lapides obtained a Bachelor of Science in Economics degree from the Wharton School at the University of Pennsylvania. In 1980, he obtained a Masters of Business Administration degree from New York University. He obtained licenses to practice as a Certified Public Accountant in New York in 1978 and in Georgia in 1996.

11. Lapides was employed as an Adjunct Associate Professor in the Business School at New York University from 1980 through 1992 and at Columbia University in 1991.

12. Lapides was employed as an Assistant Professor of Management at Life College from 1991 through 1993.

13. Lapides has authored, co-authored or has been a contributing author of twenty-four books and book supplements on management, real estate, and directors' responsibilities. These books include a best-selling textbook and several highly acclaimed professional books.

14. Lapides has authored or co-authored in excess of one hundred published articles.

15. Lapides has achieved national recognition for his work in the fields of corporate governance and real estate.

16. Lapides was hired by KSU as an Assistant Professor in the summer of 1993 to teach in the Department of Management and Entrepeneurship of the Coles College of Business of KSU.

17. In his annual performance evaluations until the year during which Lapides complained that he was being discriminated against because of his religion, Lapides consistently received the highest possible rating ("Above Expectations") in every rated category (i.e., Teaching Effectiveness, Intellectual Contributions, and Service).

18. In his students' course evaluations each semester throughout his tenure at KSU, Lapides consistently received high praise for the quality and effectiveness of his teaching.

19. In addition to his teaching and related responsibilities, in the summer of 1995, Lapides co-founded, with Dr. Dana Hermanson ("Hermanson") the Corporate Governance Center ("CGC").

20. The CGC provides corporate governance information to directors, researchers, professors, advisors, and other interested parties. For several years, it was the largest center of its kind in the United States and was nationally recognized as a leader in the field of corporate governance, frequently being included in lists of similar programs at the "Top Ten" business schools in the country.

21. Lapides and the CGC repeatedly have received recognition in both national and local media since the CGC's inception, with Lapides being regularly quoted in business publications – such as The Wall Street Journal, Success, Los

Angeles Times, and Business Week – and selected as a speaker on corporate governance at numerous academic, industry, professional, and corporate meetings and conferences.

22. Lapides has been appointed to the Advisory Council of the National Association of Corporate Directors ("NACD") (1996 to present), its National Faculty (1999-2000), and served on the NACD's Blue Ribbon Commission on Audit Committees (1998-99).

23. Lapides was the only male appointed to the board of directors of Board of Directors Network, Inc., which is the only organization in the United States whose purpose is to increase the number of women on corporate boards.

24. Lapides was invited to and did join the advisory boards of SmallBizPlanet.com, Inc., WorldWideTesting.com, Inc., Hi-Tech Partners Group, TradePath Technologies, LLC, and PressCafe.com, Inc.

25. In 1996, Lapides received two Awards of Excellence from the Coles College of Business at KSU – one for his work with the Coles College Advising Team and one for his work with the CGC.

26. In 1997, Lapides received another Award of Excellence from Coles College for his work with the CGC's Directors University programs.

27. In 1999, Lapides was a finalist for KSU's Distinguished Service Award jointly with Hermanson as a "Collaborative Team."

28. In 2000, Lapides received KSU's Distinguished Service Award jointly with Hermanson as a "Collaborative Team."

29. In 1997, in connection with Lapides's application for tenure, Dr. Timothy Mescon ("Mescon") (Dean of the Coles College of Business) gave Lapides a glowing endorsement for tenure, including the following:

> Your efforts as a faculty member . . . have been most impressive. In your years as a faculty member in the College, you have taught four different courses all at the undergraduate level. Your evaluations are consistently superior and your classroom innovations are impressive. As importantly, you have demonstrated great competency at both the undergraduate and professional levels and this is truly acknowledged by your students and colleagues. I am delighted that you will be teaching in our graduate program as well. . . .
>
> Your service to the institution has been exemplary. You founded the Corporate Governance Center and continue to direct this fine enterprise. The exposure gained by the College and University through the Center has been invaluable and you have led the media charge in an impressive manner. . . . [T]he fact that a number of Coles College faculty are also involved in the Center is a testimony to your ability to mentor and guide colleagues successfully.

> Your scholarship clearly supports the Cole College mission of applied research. You have authored or co-authored one textbook, nine professional books, five book supplements, nine chapters and 56 articles. . . .
>
> Paul you are a truly fine faculty member and I commend you on your many accomplishments. I thank you for your contributions and wish you continued success in the years ahead.

30. A true and correct copy of Mescon's endorsement letter is attached in the Appendix to this Complaint at Tab 3.

II. False Sexual Harassment Complaint in 1997

31. In July 1997, a female student named Laurie Lunn ("Lunn") who had recently graduated from KSU called Dr. Teresa Covin ("Covin"), then Chair of the Department of Management and Entrepeneurship, to set up a meeting to talk about a problem with a professor.

32. Rather than immediately refer Lunn to KSU's EEO officer (as required by KSU policy upon information and belief), Covin set up an appointment to meet with Lunn and then met with Lunn to hear her complaint and to review Lunn's notes regarding the alleged behavior.

33. Lunn alleged that Lapides, in a Fall 1996 semester course, made various comments to the class that were offensive to Lunn and that she believed were inappropriate. (Lunn did not allege any touching of any kind or any sexual advances of any kind).

34. Covin referred Lunn to KSU's EEO officer, Dr. Melvis Atkinson ("Atkinson"). However, rather than refer Lunn confidentially (as required by KSU policy upon information and belief), Covin also informed both Dr. Flora Devine ("Devine") (an attorney who is Assistant to the President for Legal Affairs) and Mescon of both the fact and substance of Lunn's complaint, including that Lunn had made notes or a log of the allegedly offending in-class comments.

III. Unreported and False Sexual Harassment Complaint in 1996 and Covin's Fabrication of "Notes" in 1997 Regarding the 1996 Complaint

35. Gratuitously, Covin also informed both Devine and Mescon that Lapides (according to Covin) had been accused of "sexual harassment" before by another student and that Covin had documentation of a remediation procedure in connection with that complaint.

36. In fact, there had been no remediation procedure in connection with the alleged earlier complaint because Lapides had never been informed of the previous complaint and had never been given an opportunity to respond to the alleged complaint.

37. And in fact, Covin did not have any documentation of the alleged remediation procedure in connection with the alleged earlier complaint. As Covin has since admitted, in July or August 1997, she fabricated "notes" of the alleged April 1996 complaint and of her alleged meeting with Lapides to discuss the alleged complaint in April 1996.

38. Covin's "notes," typed more than a year after the alleged previous complaint, falsely state that Lapides admitted and apologized for the complained of conduct.

39. Compounding her wrongdoing, Covin later added handwritten notes to the typed notes, falsely describing the typed notes as having been generated at the time of the alleged previous complaint.

40. Covin's "notes" are demonstrably false. For example, the "notes" claim that Lapides excused his alleged behavior with the explanation that his father had passed away several months ago and that he was therefore under a lot of stress. Unfortunately for Covin, the "notes" of the alleged meeting are dated two weeks before Lapides's father died.

41. Even if there had in fact been a previous complaint to Covin, her handling of the informal complaint – in not requiring a formal written complaint, in not referring the matter to Atkinson to handle, and in informing Mescon of the complaint – violated KSU policy.

IV. Discriminatory Investigation of the 1997 Complaint

42 Lunn filed a formal complaint of sexual harassment with Atkinson on July 23, 1997.

43. Rather than leaving the investigation of Lunn's complaint to Atkinson (as required by KSU policy upon information and belief), Mescon and Covin continued to be involved in the investigation personally, by telephone, and by written memoranda to and from Atkinson.

44. Contrary to KSU's stated policy, during the thirteen days between Lunn's call to Covin regarding her complaint and Lunn's filing of a formal sexual harassment complaint, Atkinson received calls and correspondence from Mescon, Devine, and Covin; corresponded with Mescon; interviewed Covin; met with Mescon; and received and reviewed Lunn's "log" of alleged inappropriate in-class comments.

45. In stark contrast, Atkinson, Vice President Edwin Rugg ("Rugg"), Devine and other administrators of KSU have consistently taken the position in response to any complaint by Lapides that KSU will not take any action or conduct any investigation until a formal written complaint, complete with supporting documentation, has been submitted to KSU's EEO office. KSU appears to enforce that "policy" only against Lapides and other Jewish faculty.

46. Atkinson finally met with and informed Lapides of the complaint on August 1, 1997. Lapides denied making any of the comments alleged by Lunn. Atkinson's words and tone even at this initial meeting concerned Lapides, prompting him to ask her about his rights in the process.

47. At her meeting with Lapides, Atkinson gave him a notice letter dated August 1, 1997 that was patently improper. The letter provided some of the specifics of Lunn's complaint, but stated those specifics as if they were established facts and did not qualify them as allegations. The letter concluded (before any investigation) that "such behavior makes for a hostile, offensive, and intimidating learning environment." The letter did not attach a copy of the complaint. Finally, the letter contained no request for and no assurance of confidentiality (and confidentiality never was provided).

48. A true and correct copy of the August 1, 1997 notice letter is included in the Appendix to this Complaint at Tab 4.

49. On August 11, 1997, Lapides provided a written response to Lunn's complaint, along with affidavits of two other students in the class in question (a male and a female) confirming that Lapides had never made the alleged comments. Lapides also requested a meeting with Atkinson and counsel for the University "to discuss handling this matter in such a way that protects my rights." Lapides's request was ignored.

50. A true and correct copy of Lapides's August 11, 1997 response is included in the Appendix to this Complaint at Tab 5.

51. Atkinson subsequently interviewed eight of the fifteen students in the class in question. None of the students corroborated Lunn's complaint.

52. Atkinson's investigation was fraught with errors. Significantly, among other errors, Atkinson never instructed the complaining student, Mescon, Devine, or Covin that they were required to keep the complaint and the investigation confidential.

53. As a result, one or more of the administrators disclosed information about the complaint to other faculty and/or staff, resulting in widespread and long-standing rumors that Lapides had sexually harassed female students.

54. It is difficult to regard as unintentional Atkinson's failure to preserve the confidentiality of the complaint about

Lapides. Atkinson is the senior EEO official of KSU, charged with investigating any and all complaints of sexual harassment and other discrimination at KSU. She is fully aware of the importance of confidentiality in her investigations, and specifically in sexual harassment investigations, as she herself demonstrated just one month after concluding her investigation of Lapides. In a September 30, 1997 memorandum to all faculty and staff of KSU, Atkinson included a "Sexual Harassment Fact Sheet" that stressed that all participants in an investigation of alleged sexual harassment must keep the complaint and investigation confidential.

55. A true and correct copy of Atkinson's September 30, 1997 memorandum and the "Sexual Harassment Fact Sheet" is included in the Appendix to this Complaint at Tab 6.

56. Another critical error by Atkinson was her assurance to Lunn that Lunn was essentially insulated from any adverse consequences from making her complaint. In fact, as Atkinson knows or should know, there is no absolute protection for making false complaints. Had Lunn been properly informed that a false complaint could subject her to civil and other liability, it is likely that Lunn would not have gone forward with her false complaint.

57. Atkinson ultimately concluded, correctly, that there was nothing to support Lunn's allegations.

58. Atkinson informed Covin of her conclusion before anyone else (contrary to KSU policy upon information and belief). Covin's response was to ask, "was that all to the investigation?"

59. Atkinson met with Lapides on August 29, 1997 to inform him of her conclusions. At that meeting, Lapides for the first time learned of Covin's allegation that she had counseled him regarding a student's alleged complaint that he had made inappropriate comments to her. Lapides denied that he had done or said any of the things alleged by Covin, and he denied that he had ever admitted to Covin doing or saying any of the things alleged.

60. Although Lapides requested that Atkinson investigate the allegations of Covin (and the student) so that he could clear his name, Atkinson refused to do so.

61. At the August 29, 1997 meeting, Lapides informed Atkinson in good faith that another student in his Fall 1996 course with Lunn had raised the **possibility that Lunn's complaint was motivated by gender bias and by anti-Semitism**: Lunn had told the other student that Lapides reminded her of her ex-husband and that **she hated all men and all Jews**.

62. Atkinson's notes of her meeting with Lapides confirm that he raised the concern that Lunn's complaint had been motivated by anti-Semitism. According to her notes, Lapides "said that he did not know why Lunn was doing this **unless it's because he is Jewish**."

63. A true and correct copy of Atkinson's notes of the August 29, 1997 meeting is included in the Appendix to this Complaint at Tab 7.

64. Despite subsequent requests by Lapides, Atkinson never investigated this information about Lunn's motivation.

65. Based upon documents provided to Lapides in response to a request under the Georgia Open Records Act, only three professors or instructors were investigated for sexual harassment complaints in the 1994-99 time frame, two of whom were in the Management and Entrepreneurship Department, both of whom were supervised by Covin, and both of whom were Jewish.

66. The non-Jewish instructor who was investigated for sexual harassment during this time frame was treated significantly better than Lapides, including but not limited to providing the non-Jewish instructor with a copy of the complaint, maintaining confidentiality in accordance with KSU's rules, and treating the complaint as allegations rather than assuming the student's allegations were true.

V. Discriminatory "Clearance" Letter

67. Atkinson concluded her investigation with separate letters to Lunn and Lapides – letters that differed dramatically in their content.

68. In her letter to Lunn, Atkinson wrote simply and without qualification that the evidence gathered during her investigation did not support Lunn's claim of a sexually hostile environment in the class and that the investigation was therefore concluded.

69. A true and correct copy of Atkinson's August 28, 1997 letter to Lunn is included in the Appendix to this Complaint at Tab 8.

70. By contrast, in her "clearance" letter to Lapides,

Atkinson did not write simply and without qualification that the investigation was completed and did not support Lunn's sexually hostile environment claim.

71. Instead, Atkinson's "clearance" letter went on to question Lapides's professionalism and to imply strongly that he was at least in danger of creating a sexually hostile environment.

72. Atkinson's "clearance" letter stated:

> However, there was at least one other student in the class who had concerns about your conduct, joke telling, before and at the end of class lectures. In light of this, I suggest that at all times you display a professional educational atmosphere in your classes and with all students. I ask that you make an appointment to come by my office and view a video on sexual harassment on campus. This is a video I ask instructors who have been in a similar situation as you to view.
>
> Because some parts of your lectures deal with the treatment of women in business which some students may find offensive, I suggest you discuss the appropriateness of such articles with your chair [Covin] and on your outline include a warning that such material will be covered in class.

As I indicated to you earlier, in no way should there be any form of retaliation brought against Ms. Lunn for having filed this claim.

73. These alleged "concerns" by one student were contained only in Atkinson's handwritten notes of a telephone interview with the student. Lapides was not provided with a copy of the notes and was never given an opportunity to respond to the alleged "concerns." Had he been given an opportunity to respond to the notes, Lapides would have done so.

74. Atkinson copied the letter to Mescon and Covin.

75. A true and correct copy of Atkinson's "clearance" letter to Lapides is included in the Appendix to this Complaint at Tab 9.

76. Atkinson's "clearance" letter was wholly inadequate to clear Lapides's name and reputation because it essentially stated that, while he may not have been guilty of the precise conduct of which he was accused by Lunn, he was guilty of otherwise unprofessional and questionable conduct and would have to take certain corrective actions as a result.

VI. Lapides's Complaints About the Discriminatory Investigation and Discriminatory "Clearance" Letter

77. The absence of any real clearance as a result of Atkinson's investigation became even more obvious from the administrators' follow-up on the clearance letter.

78. On September 3, 1997, Covin publicly insisted to Lapides that he should meet with her and Mescon to discuss Atkinson's findings. Lapides questioned the need for such a meeting if he had in fact been cleared of any wrongdoing.

79. Lapides suggested in good faith that the subject of

any meeting should include (a) possible litigation against Lunn for filing a false complaint, **especially if Lunn had made the complaint because Lapides was Jewish**, and (b) reviewing and improving KSU's procedures for investigating sexual harassment complaints in general and addressing the mistreatment of him in particular.

80. Lapides's reference to possible anti-Semitism is confirmed by Covin's own notes of the conversation, which quote Lapides as saying, "**If this is because I'm Jewish**, then this is going to be really big."

81. A true and correct copy of Covin's notes of the conversation is included in the Appendix to this Complaint at Tab 10.

82. Covin became hostile, standing in the hallway outside Lapides's office and saying (within the hearing of others), "we have to make sure this doesn't happen again," and shouting, "I could see how some of these things could be true."

83. Covin also said (again within the hearing of others) that this was not the first report of an incident of this nature, that Lapides had said inappropriate things to her at times, that it was important to discuss the issue to make sure it did not happen again, and that it could happen again.

84. These remarks by Covin, particularly in public, were completely improper and unwarranted.

85. The following day, according to Atkinson's notes, Covin and Atkinson discussed Atkinson's findings, **including specifically Lapides's concern about anti-Semitism**.

86. A true and correct copy of Atkinson's notes of the Septen ber 4, 1997 meeting with Covin is included in the Appen dix to this Complaint at Tab 11.

87. In a September 19, 1997 letter, Atkinson assured Lapide that the investigation had been done "as required by law . . . di strictly [and] confidentially," even though this was not true.

88. A true and correct copy of Atkinson's September 19, 199 7 letter is included in the Appendix to this Complaint at Tab 1

89. Lapides met with Mescon, Covin, and Atkinson, on Se tember 22, 1997, at which time Lapides reiterated to the admin strators that he objected to the manner in which the invest gation had been conducted, that KSU administrators had failed to keep the facts of the investigation confidential and had disclo ed the false charges to students and faculty members who were not involved in the investigation, and that Atkinson wrong y refused to give Lapides a fair and unqualified clearance letter. Lapides requested an apology for this mistreatment.

90. The administrators' response, shockingly, was that Lapide would never receive an apology and had better hire a good lawyer and have a lot of money if he intended to pursue the matter.

VII. Discrimination and Retaliation

91. From the time Lapides first complained that he had been discriminated against because of his religion, KSU and its administrators, through a series and pattern of deliberate

actions and inactions, retaliated against Lapides for complaining about unlawful discrimination and created a hostile work environment for Lapides that has continued to the present, including but not limited to the following:

(a) Job Threats and Inaction on Lapides's Complaints

92. On February 25, 1998, Lapides and his attorney met with Devine to review Open Records Act records that had been requested three months earlier. Lapides then learned for the first time of Covin's fabricated and backdated notes regarding the alleged 1996 student complaint.

93. At that same meeting, Lapides informed Devine of Covin's hostile comments on February 20. Lapides also informed Devine about Covin's offensive comments on other occasions, including comments on one occasion about Lapides's body in front of two female professors.

94. In stark contrast with her earlier handling of Lunn's allegations against Lapides, Devine made light of Covin's comments, saying that Lapides should be flattered rather than offended.

95. In March 1998, a fellow management professor asked Lapides about rumors Lapides had harassed female students, declining to say who she heard the rumor from.

96. On March 27, 1998, a senior management professor told Lapides that Lapides would not be allowed to stay if he continued to pursue this matter, tenured or not, and strongly suggested that Lapides just let this go.

97. On April 3, 1998, a senior member of the administrative staff pointedly asked Lapides, "What are you doing here? What is it going to take to get you to quit?"

98. On May 29, 1998 (and on several subsequent occasions to other KSU administrators, including the President), Lapides's attorney requested in writing that Devine investigate the actions of the Office of Minority Affairs, Davis, and others, noting that he and Lapides had expressed their "hostile work environment concerns" at their February 25, 1998 meeting with Devine, that "the situation has gotten significantly worse," and that the discriminatory investigation and the subsequent job threats, defamation, and **hostile work environment** were having a "devastating effect on Paul Lapides' reputation."

99. Lapides's attorney also wrote: **"It is particularly troubling to note that although Mr. Lapides was advised [by another student in the class] that anti-Semitism might have initiated Lunn's allegations, no effort was made to question Lunn about this."**

100. Lapides's attorney complained again that Lunn's allegations continued to be circulated among faculty, staff, and students.

101. And Lapides's attorney noted that complaints about KSU's refusal to investigate accusations of discrimination and retaliation were contemporaneously being made in several other lawsuits against KSU.

102. A true and correct copy of the May 29, 1998 letter to Devine is included in the Appendix to this Complaint at Tab 13.

103. On June 16, 1998, Devine responded to Lapides's attorney's letter, acknowledging that **"Professor Lapides has requested an 'investigation', with allegations of 'on-going' issues and a 'hostile' work environment"** and promising that "the University will treat it as a formal request and review the situation."

104. In spite of this assurance, KSU has never initiated any investigation and instead has consistently excused itself on the claim that Lapides has never made a formal complaint sufficient to trigger an investigation (which is not true and is directly contradicted by Devine's assurance in this letter).

105. A true and correct copy of Devine's June 16, 1998 letter is included in the Appendix to this Complaint at Tab 14.

106. In an effort to resolve his grievances informally, and at the suggestion and recommendation of Devine, Lapides agreed to meet informally with Devine and the other KSU administrators on August 4, 1998. On August 3, 1998, Devine abruptly and without warning canceled the scheduled meeting.

107. On information and belief, Devine then misled at least Covin about the cancellation, telling Covin that Lapides and his attorney had canceled the meeting.

108. On August 4, 1998, Lapides's attorney met with Devine, at which time he gave Devine a memorandum detailing a seventeen-point list of errors by Atkinson in her investigation of Lunn's complaint.

109. Paragraph 15 of the seventeen-point memorandum repeated Lapides's previous complaint that Atkinson had never

taken seriously the anti-Semitic motivation that may have been behind Lunn's allegations, saying: **"Atkinson's notes don't report that my client informed her that one of the students in the class suggested to him that Lunn's allegations may have been because my client reminded her of her ex-husband, that she hated all men, and all Jews."**

110. After discussing some of the seventeen points, Devine returned the memorandum to Lapides's attorney, saying that she did not want it. (KSU thereafter would repeatedly complain that Lapides had not put his complaints in writing).

111. A true and correct copy of the seventeen-point memorandum is included in the Appendix to this Complaint at Tab 15.

(b) <u>Denial of Promotion, Reassignment of Graduate Class and Reassignment to "Track B"</u>

112. Also in August 1998, Lapides prepared and submitted his portfolio for promotion to Associate Professor.

113. This was in accordance with Covin's instructions one year earlier to do so if another professor obtained a promotion in the 1997 process despite not having a Ph.D. in his field (and that professor did receive the promotion).

114. Unexpectedly, Mescon attempted to intimidate Lapides into not submitting his portfolio, and Covin later professed to be surprised that Lapides had sought promotion despite not having a Ph.D. in his field.

115. Also in August 1998, Covin unexpectedly reassigned Lapides's only graduate course to another professor, without consulting either Lapides or Professors Brawley and Roberts, who would normally be consulted before any such reassignment. Brawley and Roberts asked Covin to reconsider, which Covin did in part by agreeing to allow Lapides to teach the course the next year (in Fall 1999). However, Covin suggested that Brawley and Roberts could help her by encouraging Lapides to move to the Accounting Department.

116. On August 27, 1998, already almost nine months into the two-year review cycle, Covin informed Lapides for the first time that he had been assigned to "Track B," the "Teaching-Scholarship-Service Model." The "Track B" assignment required Lapides to teach thirteen classes over two years and to make two presentations at refereed conferences or to have one publication in a refereed journal (by December 31, 1999). These were significantly different requirements than Lapides had ever been subjected to and required significantly different allocation of work over the fifteen months remaining in the two-year period.

117. For example, in order to meet the new requirements, Lapides was forced to discontinue writing *The REIT Report's* "From the Boardroom" column (Lapides, co-founder of the column, had been writing/editing the column since Spring 1994) and was forced to discontinue his column for *Director's Monthly*. Both publications are published by the leading membership organizations in their respective fields. Lapides was also forced to stop writing for *Institutional Real Estate Investor* and to turn down other opportunities to write.

118. These non-refereed writings had generated

significant recognition for KSU, Coles College, the CGC, and Lapides.

119. Lapides asked Covin for a meeting to discuss the abrupt reassignment to Track B, but Covin declined to meet with Lapides and instead had Mescon meet with Lapides to explain the changes. At that meeting, Mescon maintained that Covin had the right to reassign Lapides and asked Lapides to change departments, either to Accounting or to Leadership and Professional Development.

120. The reassignment to Track B was in violation of the Faculty Workload Guidlines in KSU's Faculty Handbook.

121. The reassignment to Track B was in violation of the Guidelines for Faculty Performance Planning and Evaluation of the Business School.

122. Upon information and belief, Defendant has not reassigned non-Jewish professors to different teaching tracks in violation of the above-referenced guidelines or without input and agreement from the professor.

123. On November 17, 1998, Lapides was notified by the Coles College Tenure & Promotion Committee that it was unable to agree on a recommendation regarding his promotion to Associate Professor. (The Committee was chaired by a person who would, within the next few weeks, participate in attempting to pressure another student into filing a false complaint of sexual harassment against Lapides.)

124. Mescon had been adamant at the College Committee meeting that he did not want Lapides promoted

(which Lapides did not learn until much later). This contradicts Mescon's later testimony that he said nothing about Lapides's promotion at the meeting.

(c) Attempted Coercion of Another False Sexual Harassment Complaint and False Police Report

125. Also on November 17, 1998, unbeknownst to Lapides, Ken Robinson ("Robinson"), Associate Professor of Management & Entrepeneurship, faxed a "draft" memorandum to Mescon (dated November 12, 1998) with a note asking Mescon to look over the draft of the memorandum to see if any changes should be made. The memorandum alleged that Lapides had an inappropriate conversation with Robinson's "former student" regarding Robinson's sexual habits, and requested Lapides's dismissal.

126. In fact, the former student was Mindy Buckalew ("Buckalew"), who had been while a student of Robinson, and was still at the time, Robinson's live-in lover, according to Ms. Buckalew's sworn statement.

127. Mescon placed Robinson's memorandum in Lapides's personnel file without ever informing Lapides about this scurrilous allegation (contrary to KSU policy upon information and belief).

128. Lapides did not learn of the memorandum until nearly two years later when Mescon was deposed on August 30, 2000.

129. Lapides was never given an opportunity to

respond to the allegation in the memo, which was categorically false.

130. On November 25, 1998, again without Lapides's knowledge, Mescon, Covin, Devine, Terri Lavelle (Assistant to Mescon), and Ted Cochran (KSU's Chief of Police) met with Buckalew in effort to have her file a false sexual harassment complaint against Lapides, while Robinson waited outside the room in the hall.

131. Buckalew has since testified in an affidavit that the administrators kept her in the meeting for three hours, made her feel "backed into a corner with no way out," and told her (falsely) that there were four or five other female students who would make complaints against Lapides and that they needed her to "lead the pack."

132. When Buckalew told the administrators that she really did not want to do what they were asking, they continued to insist. As a result, she was very upset and cried most of the meeting.

133. Buckalew finally told the administrators that she would go home and think about it so she could "get out of there."

134. Upon information and belief, some or all of the administrators knew that Buckalew and Robinson were living together at that time and that they were involved in a sexual relationship, contrary to KSU policy and common sense.

135. The administrators also encouraged Buckalew to file a criminal complaint against Lapides for alleged assault and

threats.

136. Buckalew has testified that in her opinion the administrators were more interested in getting a complaint about Lapides than in finding the truth, and that she is not sure who the person was who had the offensive telephone conversation with her that triggered Robinson's memorandum to Mescon, but she does not believe and does not have any proof that it was Lapides.

137. A true and correct copy of Buckalew's affidavit is included in the Appendix to this Complaint at Tab 16.

138. The administrators were not deterred by Buckalew's refusal to make a complaint against Lapides at the November 25, 1998 grilling. On December 1, 1998, Devine wrote to Buckalew that "the University will be reviewing the matter of professional misconduct . . . alleged inappropriate comments made by one professor about another professor." (Again, this contradicts the administrators' repeated excuse to Lapides that they would not act on or investigate any complaint of his unless it was made formally, in writing, and with extensive documentation).

139. In the December 1, 1998 letter, Devine also advised Buckalew (again) to report the matter to the police.

140. Lapides was not given a copy of this letter until Mescon's August 30, 2000 deposition.

141. Around the same time as Devine's letter to Buckalew, Elizabeth Fitzgerald ("Fitzgerald") called Buckalew to encourage her to file a sexual harassment complaint against Lapides.

142. Fitzgerald was the Chair of the Department of Management and Entrepeneurship Tenure and Promotion Committee for 1998-99, the Committee that had considered and deadlocked on Lapides's application for promotion to Associate Professor the previous month.

143. On December 31, 1998, Buckalew, with Robinson as an "other involved party," filed a false Incident Report with the Cobb County Police alleging several instances of assault by multiple perpetrators from October 1998 through December 31, 1998.

144. The Incident Report falsely claimed that Lapides had made death threats to her and pointed a pistol at her.

145. Robinson left during the filing of the report, after the Reporting Officer informed him of the possible consequences for witnessing the filing of a false report.

146. The investigating officer later concluded: "I can not find a foundation for the allegation indicating that a crime ever was committed in the first place and am clearing this case as unfounded."

147. Buckalew has since testified under oath that she does not believe that Lapides was involved in any of the incidents, but that she was led to believe it was Lapides by Robinson and others.

148. Though the KSU administrators were aware of the false Incident Report almost immediately after it was filed, they never informed Lapides of the report or gave him any opportunity to respond to it. (The police did not even need to

interview Lapides in order to determine that the report was unfounded, so Lapides remained unaware of it.)

149. In fact, the KSU administrators used the existence of the false police report against Lapides. On January 8, 1999 Devine wrote to two attorneys in the Georgia Attorney General's Office, responding to a letter to President Siegel from Lapides's attorney (discussed more fully below).

150. In concluding her argument that the Attorney General's office should not get involved, Devine stated: "Finally, as I have informed you by telephone, there is currently a second sexual harassment investigation underway relative to a claim which was made by a student in Lapides's Spring 1998 class [Buckalew]. That investigation is being conducted by the University's Chief of Police . . . and the complaint included allegations of conduct which could potentially be the subject of a criminal complaint."

151. Devine sent copies of this memorandum to President Siegel, Mescon, and Covin. Devine did not send a copy to Lapides or his attorney, despite the fact that she was writing to the Attorney General's office in connection with a request from Lapides's attorney.

152. Lapides remained unaware of this memorandum (and of the criminal investigation on which it relied) until almost two years later, in August 2000, and therefore had no opportunity to respond to it.

153. On January 11, 1999 – three days after Devine's memorandum using the false police report against Lapides – KSU's Chief of Police (Cochran) sent an e-mail to Devine, Vice

President Rugg, and Mescon (among others) informing them (a) that the police investigator had told Buckalew that he was unwilling to apply for a criminal warrant and (b) that, as a result, Cochran was putting the matter in his inactive file.

154. Despite the fact that Devine had explicitly relied on the false police report as a reason that the Attorney General's office should not get involved, Devine did not immediately inform the Attorney General's office of the outcome of the investigation. In fact, Devine never informed the Attorney General's office that the false police report had been cleared as unfounded.

155. As with Devine's January 8, 1999 memorandum to the Attorney General's office, the administrators did not provide Lapides or his attorney with a copy of Mr. Cochran's e-mail until more than a year later.

(d) No Action on Lapides's Formal Complaint to President Siegel

156. In the meantime, being unaware of the administrators' efforts to secure a false sexual harassment complaint from Buckalew, Lapides submitted a formal written complaint to the President of KSU, Dr. Betty L. Siegel ("Siegel").

157. Lapides's attorney's complaint letter to President Siegel, dated December 29, 1998, made a formal request for an investigation both of Atkinson's actions in handling the Lunn complaint in 1997 and of the "job threats, defamation, and **hostile work environment** which Professor Lapides has been experiencing since the University's investigation of this matter."

158. Accompanying the written request for investigation was a spiral bound volume of seventeen exhibits documenting Lapides's complaints.

159. A true and correct copy of the complaint to President Siegel (without attachments) is included in the Appendix to this Complaint at Tab 18.

160. Seigel refused to investigate Lapides's complaints.

(e) First Ever Mixed Performance Review

161. In late February 1999, Lapides had his performance review for calendar year 1998.

162. Unlike all previous years, Covin gave Lapides no clear indication of her evaluation of him at the meeting, no doubt because (as Lapides would find out nearly a month later in Covin's written evaluation of his performance), for the first time ever in Lapides's career at KSU, Covin had rated him merely "At Expectations" (rather than "Above Expectations") in the "Intellectual Contributions" category.

163. At the performance review meeting, Lapides found out for the first time that Covin had been told (falsely) that it was Lapides and his attorney who had canceled the August 4, 1998 meeting.

164. Also at the performance review meeting, Covin told Lapides that she hoped he would move to the Accounting Department.

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165. On March 19, 1999, Lapides received Covin's Evaluation of Performance 1998.

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166. For the first time, Lapides learned that he had ed "Above Expectations" in teaching and service but "At Expectations" for intellectual contributions. This ing was ostensibly because during 1998 Lapides had no ions in refereed journals (though he did have two articles ed and pending publication). Covin inexplicably the fact that presentations at refereed conferences also the "intellectual contributions" category). Covin Lapides that if no articles were published by the end of would be rated "Below Expectations" and would be move to "Track A" for the next two-year review cycle.

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167. In addition, Covin's written evaluation sly directed Lapides to the Faculty Handbook's n regarding professional obligations, utterances, and not inating against or harassing colleagues, saying, "I ask that sider this statement as you interact with colleagues ng me). . . .Your willingness . . . to abide by the onal obligations noted above should lead to a more ive work environment."

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168. A true and correct copy of the Evaluation of ance 1998 is included in the Appendix to this Complaint 9.

(f) Reliance on False, Uninvestigated Prior Complaint to Justify Refusal to Clear Lapides Record

169. On March 12, 1999 (in between the verbal performance review in February and the written performance review on March 19), Lapides received a memorandum from Vice President Rugg perpetuating the discrimination and retaliation against Lapides.

170. Despite the fact that he had admitted that he had not read any of the materials that Lapides repeatedly had provided to the administrators regarding his complaints, Vice President Rugg maintained in his memorandum that KSU had no duty to take any action on Lapides's complaints because Lapides had not provided a "written list and supporting documentation."

171. Vice President Rugg's excuse for KSU's inaction was facetious. As recently as December 28, 1998, Lapides, through his attorney, had provided President Siegel with a formal written request for an investigation both of Atkinson's actions in handling the Lunn complaint in 1997 and of the "job threats, defamation, and **hostile work environment** which Professor Lapides has been experiencing since the University's investigation of this matter," along with a spiral bound volume of seventeen exhibits documenting Lapides's complaints.

172. Incredibly, Vice President Rugg took the position that KSU could not issue an unequivocal clearance letter to Lapides regarding the Lunn complaint because "of another complaint (informal) of a similar nature that was brought to [Covin's] attention by a student but not pursued formally."

173. Vice President Rugg was referring to the Spring 1998 complaint as to which Covin fabricated and backdated notes of a non-existent admission by Lapides.

174. Thus, on the basis of a prior informal complaint – as to which KSU administrators have repeatedly told Lapides they will take no action – that was never investigated, regarding conduct that Lapides has denied, and the only documentation of which is fraudulent, KSU continued to defend (a) its refusal to exonerate Lapides in the unrelated and also unfounded Lunn incident and (b) its keeping in Lapides's file an obviously equivocal "clearance" letter.

175. In addition, KSU continued to stonewall Lapides's complaints about his treatment and continued to discriminate and retaliate against him. For example, Vice President Rugg's March 12, 1999 memorandum went on:

(a) To describe Lapides's requests for redress as "litigious posturing";

(b) To accuse Lapides of "misleading and inaccurate communications . . . that appear to be attempts to fabricate or manufacture grounds for a grievance or legal claim";

(c) To impose solely on Lapides the duty "to avoid an irreconcilable breakdown" of his relationship with Covin;

(d) To threaten reassignment;

(e) To recite the Faculty Handbook provisions regarding effective collaboration and teamwork and regarding faculty utterances and not discriminating against or harassing colleagues;

(f) To say that Vice President Rugg, Covin, and Meacon agreed that Lapides's performance "is not meeting our expectations in regard to these specific

professional respo nsibilities";

(g) To describe Lapide s's behavior in pursuing his concerns as "inappropriate and unprofessional"; a nd

(h) To "put [Lapides] on notice that we fully expect you to imp rove your behavior and performance in hese areas and show substantial progre ss by the end of the current spring sem ester."

176. At KSU, apparently, complaining about discriminatory and retaliatory treatment is "inappropriate and unprofessional" and grounds for further retaliation.

177. A true and correct copy of Vice President Rugg's March 12, 1999 memorandum is included in the Appendix to this Complaint at Tab 20.

178. On August 16, 1999, Lapides asked Vice President Rugg (with whom he had met several times during the summer in an effort to resolve the on-going problems) for a leave of absence or other accommodation for Lapides to deal with the significant stress of his teaching track responsibilities, his CGC responsibilities, and the on-going discrimination and retaliation.

179. Vice President Rugg deliberately ignored Lapides's request until the semester started (when it was essentially too late to do anything), then referred the request to Mescon, who in turn referred it to Personnel, which did nothing.

(g) KSU Reneges on Mediation Promises

180. On October 15, 1999, Lapides and his attorneys engaged in mediation with Vice President Rugg, Mescon, Covin, and Devine, facilitated by mediators from The Consortium on Negotiation & Conflict Resolution of Georgia State University.

181. Lapides presented seven issues for mediation: (a) issuance of a revised clearance letter to replace Atkinson's August 28, 1997 letter to Lapides; (b) issuance of a revised notice letter to replace Atkinson's August 1, 1997 letter to Lapides; (c) expungement of all documents regarding the Lunn investigation after August 28, 1997; (d) expungement of Covin's fabricated backdated notes of the alleged 1996 complaint; (e) review and development of procedures for investigating complaints; (f) addressing the slanderous rumors about Lapides resulting from the Lunn investigation and its fallout; and (g) payment of Lapides's attorney's fees ($50,000 at that time).

182. During the mediation, Lapides presented the administrators with a copy of a February 8, 1999 letter from Atkinson to a non-Jewish instructor at KSU giving that instructor notice of a student's complaint of sexual harassment.

183. In stark contrast to Atkinson's August 1, 1997 notice letter to Lapides, the notice letter to the non-Jewish instructor explicitly qualified the student's complaints as allegations rather than as facts, attached a copy of the student's complaint, advised the instructor that neither he nor the student should have contact with the other pending the investigation, and assured the instructor that the EEO office would treat the matter as confidentially as possible and would advise all involved to treat it as confidential.

184. A true and correct copy of the February 8, 1999 notice letter to the non-Jewish instructor(with names redacted for privacy) is included in the Appendix to this Complaint at Tab 21.

185. Also at the mediation, Lapides confronted Covin with proof that her notes of the Spring 1996 complaint were false, including a copy of the death certificate of Lapides's father.

186. Covin admitted that she had created the notes in July or August of 1997 and backdated them.

187. Defendant Board of Regents, through its agent Elizabeth Neely, Associate Vice Chancellor for Legal Affairs, also has admitted Covin's deception. In a March 2, 2000 memorandum to the Board of Regents file regarding Lapides's case, Ms. Neely wrote: "Dr. Covan [sic] represented to the University that she took these notes contemporaneously with the meeting. At a later mediation session, plaintiffs presented a copy of the death certificate of Professor Lapides' father dated two weeks after the purported meeting at which he was supposed to have been under stress because his father had recently died. Dr. Covan [sic] subsequently admitted that she made her alleged notes more than 15 months later in conjunction with the August 1, 1997 complaint and investigation."

188. A true and correct copy of Ms. Neely's March 2, 2000 memorandum is included in the Appendix to this Complaint at Tab 22.

189. After approximately four hours of mediation on October 15, 1999, the parties agreed on resolutions to the first four issues: (a) the August 28, 1997 clearance letter would be

revised and reissued, with the original letter being expunged; (b) the August 1, 1997 notice letter would be revised and reissued, with the original letter being expunged; (c) all post-August 28, 1997 documents regarding the Lunn complaint would be expunged and Vice President Rugg's March 12, 1999 memorandum to Lapides would be revised to delete its references to the Lunn investigation; and (d) Covin's notes of the 1996 complaint would be expunged.

190. The administrators proceeded to renege on every one of their mediation agreements.

191. On October 18, 1999, Vice President Rugg purported to issue revised August 1 and August 28, 1997 letters, promising that the revised letters would be substituted in all university files for the originals. However, the administrators refused to expunge post-August 28, 1997 documents or to revise Vice President Rugg's March 12, 1999 memo, refused to expunge Covin's false and backdated notes, and refused to return to mediation on October 30 as agreed.

192. The administrators subsequently reneged even on the revision and reissuance of the August 1997 letters, failing to remove the original letters from KSU files. At the August 2000 depositions of Mescon and Devine, Lapides and his attorneys found no fewer than nine copies of the originals of those letters still in the files maintained by the deponents.

(h) Retaliation to Take Advantage of Lapides's Illness

193. In January 2000, Lapides became seriously ill and was forced, under doctor's orders, to miss three weeks of classes

and to not teach a late-evening course at all.

194. On January 11, 2000, Lapides provided Covin and others with copies of his doctor's certificate prohibiting Lapides from teaching the late evening course and from teaching his daytime classes for the time being.

195. Despite knowing that Lapides was seriously ill, Covin did not inform the other faculty in the department of the reason for Lapides's absence. As a result, the faculty were left to wonder why Lapides was not in school during his three-week absence.

196. Despite knowing that Lapides was under doctor's orders not to teach the late evening course, Mescon and Covin on January 20 (just nine days after Lapides's first day of illness-related absence) sent a memorandum to Lapides criticizing him for failing to meet his course load obligation and falsely accusing him of "refus[ing] to teach an assigned course."

197. The memorandum concluded with the final threat that "Your actions are unacceptable and unprofessional, and hence will be reflected in your yearly performance review, merit increase and post-tenure review."

198. Mescon and Covin copied Vice President Rugg on the memo.

199. A true and correct copy of the January 20, 2000 memorandum is included in the Appendix to this Complaint at Tab 23.

200. On January 31, 2000 (just 20 days after his first day

of illness-related absence), Lapides returned to teaching his daytime courses. On that day, Lapides was informed by Mescon and Dr. Harry Lasher ("Lasher") (who had become Interim Chair of the Department of Management as of January 1, 2000) that Lapides was being reassigned to a forty-hour per week administrative job in Student Advisement because he had missed twenty per cent (20%) of his classes for the semester.

201. None of the administrators had given Lapides any warning of the twenty per cent (20%) rule or of this action.

202. If Lapides had returned to teaching only one day earlier, the percentage would have been less than twenty per cent (20%), and he could not have been threatened with reassignment to a full-time administrative position.

203. Had Lapides been informed of the administrators' intention to reassign him on the basis of the twenty per cent (20%) rule, he would have secured his doctor's release to return to teaching one day earlier.

204. On information and belief, no other tenured professor at KSU has ever been reassigned for missing twenty per cent (20%), or even more, of his or her classes in a semester due to illness. In fact, other non-Jewish professors who have missed more than 20% of their classes due to illness have received much more favorable treatment than did Lapides.

205. Demonstrating the administrators' intent to use his illness as an opportunity for further discrimination and retaliation, at least two other faculty members in the department were told specifically not to call Lapides at home to warn him that he would be reassigned once he missed twenty (20%) of his

classes, so that he would not return to teaching even one class earlier than his doctor had already approved.

206. In addition, students in Lapides's classes were told on January 27 that Lapides would be back on January 31 but that he might be reassigned to an administrative job.

207. Lapides rightly complained to Mescon and Lasher that the reassignment was motivated by **anti-Semitism and retaliation**.

208. Mescon then relented and canceled the reassignment.

209. However, the discrimination and retaliation did not end. At least one faculty member was told – by one or more of the administrators, on information and belief – that Lapides had refused to teach a class that semester and other similar untrue things about Lapides.

210. Several other faculty members were told – by one or more of the administrators, on information and belief – that Lapides had refused to teach a class and was being reassigned as a punishment.

(i) Reassignment to "Track A" and Stonewalling

211. On February 29, 2000, Lapides had his 1999 Performance Evaluation with Covin (former Chair of the department) and Lasher (interim Chair).

212. While all other Department of Management faculty were reviewed by Covin only, with Lasher merely present,

Lapides was reviewed by Lasher only, with Covin merely present.

213. At the performance evaluation, Lapides was informed for the first time that he was being reassigned yet again, this time to "Track A."

214. The reassignment had the effect of increasing Lapides's teaching load by three courses, for a total increase of four courses since the beginning of 1998. The reassignment also had the effect of negating any benefit, for performance review purposes, of the speaking and publishing efforts he had been making with great success. (Contrary to Covin's dire warnings in the 1998 performance evaluation about Lapides risking being evaluated at "Below Expectations" in 1999, Lapides's speaking and publishing in 1999 forced Covin to rate him "Above Expectations" in the "Intellectual Contributions" category for 1999.)

215. The reassignment to Track A was in violation of the Faculty Workload Guidlines in KSU's Faculty Handbook.

216. The reassignment to Track A was in violation of the Guidelines for Faculty Performance Planning and Evaluation of the Business School.

217. Upon information and belief, Defendant has not reassigned non-Jewish professors to different teaching tracks in violation of the above-referenced guidelines or without input and agreement from the professor.

218. On March 23, 2000, Lapides met with Mescon and asked Mescon to review the reassignment. In the course of the

meeting, Mescon acknowledged that Lapides had a right to a discussion with his supervisor regarding his performance requirements prior to being assigned or reassigned, which did not occur either on his reassignment to "Track B" in August 1998 or on this reassignment to "Track A" in February 2000.

219. Mescon agreed that Lapides's level of productivity was superior to all other non-terminally qualified faculty in the system.

220. Although Mescon assured Lapides that he would talk to Lapides's supervisor about allowing Lapides to remain on "Track B," and Lapides repeatedly asked Mescon and his supervisor to address the issue, Meson never followed up and Lapides was reassigned to "Track A."

(j) Inaction on Lapides's Workplace Violence Concerns

221. In November and December of 1998, Robinson had sought to have Lapides dismissed on the basis of false charges of sexual harassment and assault by Buckalew (which false charges Robinson himself had engineered, according to Buckalew).

222. When the attempt failed (though Lapides at the time knew nothing about it) and when Buckalew broke off her sexual relationship with Robinson, Robinson took a leave of absence to teach in South Carolina.

223. Inexplicably, although the administrators were fully aware of Robinson's behavior in pressuring Buckalew to make a false sexual harassment charge and a false police report, on information and belief, they never conducted any investigation

or disciplinary proceedings regarding his actions.

224. Similarly, although the administrators were fully aware of Robinson's sexual relationship with his student, Buckalew, they never conducted any investigation or disciplinary proceedings regarding his violation of KSU's policy.

225. Lapides eventually learned of the false charges and of Robinson's bizarre involvement. Lapides also learned that Robinson had purchased a gun for himself and a gun for Buckalew during the time he was attempting to sabotage Lapides.

226. Robinson returned to KSU for the Spring semester of 2000.

227. Concerned for his safety, Lapides asked Covin and Lasher at his February 2000 performance evaluation what the school would do to protect him from Robinson's bullying behavior when he returned. Lasher's response was that Lapides should take Robinson out to the parking lot and settle it.

228. Lapides subsequently raised the issue on several occasions with his new interim supervisor, but he received no response.

229. On April 5, 2001, having received no assistance from his supervisor, Lapides e-mailed a request to the KSU Public Safety Department for an investigation of the possibility of workplace violence on the part of Robinson. Lapides specifically emphasized that his request should be kept confidential, for his own and others' safety.

230. A true and correct copy of Lapides's April 5, 2001 e-mail is included in the Appendix to this Complaint at Tab 24.

231. Nevertheless, one or more of the administrators, on information and belief, informed Robinson of Lapides's request for an investigation of Robinson. On May 1, 2001, at a department meeting, Robinson startled Lapides and the other faculty by reading a prepared statement saying that he had been informed about Lapides's request for an investigation of him.

232. Lapides immediately communicated with the Public Safety Department, requesting an investigation of why Robinson was told that Lapides had asked for him to be investigated for possible workplace violence.

233. A true and correct copy of Lapides's May 2, 2001 e-mail to the Public Safety Department is included in the Appendix to this Complaint at Tab 25.

234. No investigation was ever performed.

VIII. Pattern of Discrimination and Retaliation on Campus

235. During the 1994-95 school year, KSU received complaints or was sued by five professors for religious discrimination against Jewish professors and/or retaliation for reporting same.

236. Many of the key players from KSU in these five instances were the same key players in Lapides's claim for religious discrimination and retaliation, including President Seigel, Rugg, Devine and Atkinson.

237. In each of these five instances, the complaining professor went to President Siegel to investigate the complaint.

238. Section 803.12 of the Board of Regents Policy Manual expressly states that "[w]hen a faculty member in any unit of the University System is charged with the violation of a . . . federal law . . a thorough review of the circumstances shall be carried out by the president and chancellor."

239. President Seigel has testified in open court that although she was aware of each of the five charges of discrimination and/or retaliation, she did not conduct an investigation into any of the charges.

240. Rugg, the Vice President of Academic Affairs, similarly has testified that neither he, KSU's EEO officer (Atkinson), nor any other administrator at KSU conducted an investigation into any of the charges. Rugg has explained that no investigation was conducted because a "formal" complaint with the university's EEO office had not been filed, a lawsuit did not constitute a formal complaint or charge that would trigger the president's responsibility to investigate, and it violated the university's policy to investigate allegations of violations of Title VII without a formal complaint or charge.

241. The trial in the lawsuit filed by Candy Kaspers concluded in August, 1997, the month in which KSU began its flawed investigation of the false claims against Lapides, the month in which Lapides first complained about discriminatory treatment of him because he was Jewish, and the month in which KSU administrators began to retaliate against Lapides.

242. The jury in the Candy Kaspers lawsuit found that

KSU had violated Title VII of the Civil Rights Act of 1964 because KSU had removed Kaspers as chair of her department in retaliation for her complaints that instructors in her department had been discriminated against because they were Jewish.

243. After the trial, KSU settled with Dr. Kaspers for a lump sum payment of seven hundred fifty thousand dollars ($750,000.00) in exchange for her agreement not to seek reinstatement or reemployment at KSU.

244. Approximately one week after Bari Levingston ("Levingston") filed a complaint with the EEOC in 1995 that she had been discriminated against because she was Jewish, a false incident report was filed by a former student with the university police department, alleging that Levingston had harassed and stalked him.

245. Like the false criminal incident report filed against Lapides by Buckalew, upon information and belief, the student who filed the false criminal incident report against Levingston was having a sexual relationship with a professor in the department in which Levingston taught.

246. Like the false criminal incident report filed against Lapides by Buckalew, the police department concluded that the incident report lacked foundation and did not merit an investigation; however, also like the false criminal incident report filed against Lapides by Buckalew, KSU and its administrators used the existence of the report as one of the reasons for discounting and not investigating Levingston's complaints.

247. In Levingston's EEOC complaint, Levingston stated that she complained to KSU's EEO officer (Atkinson) and its Vice President of Academic Affairs (Rugg) that she was being retaliated against because of her prior complaints regarding religious discrimination. However, no investigation of the retaliation was conducted by Atkinson, Rugg or any other representative of KSU, and, notwithstanding Atkinson's and Rugg's express promises to resolve the situation and stop the retaliation, nothing was done by either of them to protect Levingston from further retaliation.

248. In this case, Lapides has specifically complained no less than five times of religious discrimination (on August 29, 1997, September 3, 1997, May 29, 1998, August 4, 1998, December 29, 1998, and January 31, 2000), and no less than four times of a hostile working environment and/or retaliation (February 25, 1998, May 29, 1998, December 29, 1998, and January 2000). Like the Jewish professors in the 1994-95 school year, each complaint was met with additional discrimination, and, like the Jewish professors and Kaspers who complained about discrimination because the professors were Jewish, each complaint was met with a continuing and persistent pattern of retaliation.

COUNT I – RELIGIOUS DISCRIMINATION

249. Lapides realleges and incorporates by reference Paragraphs 1-248 of this Verified Complaint as if each such paragraph were fully set forth below.

250. Lapides is a Messianic Jew and a member of a protected class.

251. Lapides was subjected to a continuing adverse employment action while similarly situated non-Jews were treated more favorably.

252. Lapides was qualified for his job and the promotion that he sought.

253. Defendant's continuing conduct created a work environment that a reasonable person would find hostile or abusive and that Lapides subjectively perceived to be abusive, which altered the terms and conditions of Lapides's employment but not the terms and conditions of employment of non-Jews.

254. Defendant engaged in continuing unlawful discrimination against Lapides as a consequence of his religion in violation of Lapides's rights under Section 702(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-(2)(a).

255. As a result of said unlawful discrimination, including a hostile working environment, Lapides suffered the loss of pay, benefits, privileges and perquisites that would have accompanied promotion to Associate Professor; lost income from grants and outside writing, speaking, consulting, corporate directorships, and other lost opportunities; medical expenses; and degradation, humiliation, mental anguish, loss of dignity, and damage to his academic career.

256. As a result of said unlawful discrimination, Lapides is entitled to promotion to associate professor and an award of all back pay and lost income and benefits he would have earned had there been no discrimination, in an amount to be proved at trial.

257. As a result of said unlawful discrimination, Lapides is entitled to the maximum award of compensatory damages under 42 U.S.C. § 1981a(b) for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

COUNT II – UNLAWFUL RETALIATION

258. Lapides realleges and incorporates by reference Paragraphs 1-248 of this Verified Complaint as if each such paragraph was fully set forth below.

259. Defendant engaged in continuing unlawful retaliation against Lapides for expressing his opposition to religious discrimination, for filing an Application for Review, and for filing a charge of discrimination with the EEOC, all in violation of Lapides's rights under § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a).

260. Lapides engaged in statutorily protected expression, he suffered continuing adverse employment actions, and there is a causal relation between the two.

261. As a result of said unlawful retaliation, Lapides suffered the loss of pay, benefits, privileges and perquisites that would have accompanied promotion to Associate Professor; lost income from grants and outside writing, speaking, consulting, corporate directorships, and other lost opportunities; medical expenses; and degradation, humiliation, mental anguish, loss of dignity, and damage to his academic career.

262. As a result of said unlawful retaliation, Lapides is entitled to promotion to associate professor and an award of all

back pay and lost income and benefits he would have earned had there been no discrimination, in an amount to be proved at trial.

263. As a result of said unlawful retaliation, Lapides is entitled to the maximum award of compensatory damages under 42 U.S.C. § 1981a(b) for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

COUNT III – ATTORNEYS' FEES AND EXPENSES

264. Lapides realleges and incorporates by reference Paragraphs 1-263 of this Verified Complaint as if each such paragraph was fully set forth below.

265. Pursuant to 42 U.S.C. § 200e-5(k), Lapides is entitled to an award of reasonable attorneys' fees and costs.

WHEREFORE, Lapides respectfully demands and prays:

(a) That process issue and be served upon Defendant to appear and answer this Verified Complaint as provided by law;

(b) That judgment be entered in favor of Plaintiff and against Defendant on all counts of this Verified Complaint;

(c) That Defendant be enjoined from continuing or maintaining its religious discrimination and retaliation against Plaintiff;

(d) That Defendant be ordered to place Plaintiff in the associate professor position which he would have had absent Defendant's unlawful discrimination and retaliation, with appropriate assurances that

such unlawful retaliation will not continue or renew;

(e) That Plaintiff be awarded the lost pay, benefits, privileges and prerequisites that would have accompanied the promotion to Associate Professor had he been promoted in 1998;

(f) That Plaintiff be awarded the lost income and other compensation from grants and outside writing, speaking, consulting, corporate directorships, and other lost opportunities that Plaintiff would have received but for the unlawful discrimination and retaliation;

(g) That Plaintiff be awarded the maximum amount of compensatory damages as allowed by law under Title VII for his future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses;

(h) That Plaintiff be awarded the maximum amount of punitive damages as allowed by law under Title VII;

(i) That Plaintiff be awarded his attorneys' fees and costs in this action;

(j) That Plaintiff be awarded pre-judgment and post-judgment interest as provided by law;

(k) That Plaintiff be granted a trial by a jury on all issues triable by jury; and

(l) That Plaintiff be awarded such other and further relief as is justified by the facts and the law and as this Court deems just and proper.

Respectfully submitted this 24th day of September, 2001.

By: /s/_____
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IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

PAUL D. LAPIDES

Plaintiff

CIVIL ACTION
FILE NUMBER

vs.

00-1-01880-24

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A. RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY. MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University.

Defendants

COMPLAINT

COMES NOW, PAUL D. LAPIDES, the Plaintiff in the above-styled action and files this his Complaint, and in support thereof show the Court as follows:

1.

Paul D. Lapides is a professor at Kennesaw State University (hereinafter "KSU") in the Department of Management and Entrepreneurship and has been employed at that position for the past 6-1/2 years. Professor Lapides brings this action to address certain libelous, slanderous and defamatory statements and writings which have been disseminated about him and which have been placed in his personnel file at the University. Professor Lapides also seeks to redress complaints of a hostile work environment and the intentional infliction of emotional distress. Finally, Professor Lapides seeks the Court's assistance in protecting his constitutionally guaranteed right to practice his profession free from the procedural due process violations which have jeopardized his future.

2.

Defendant BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA {hereinafter "Board of Regents") may be served through its registered agents for service of process by serving Chancellor Stephen R. Portch, the Chief Executive Officer for the Board of Regents at 270 Washington Street, S.W., Atlanta, Georgia 30334, and by serving the Director of the Risk Management Division of the Department of Administrative Services who is Hugh Farley, at 200 Piedmont Avenue, S.E., Suite 1208, West Tower, Atlanta, Georgia 30334.

3.

Defendant EDWIN A. RUGG is a resident of Cobb County and may be served at his residence located at 2848 Windsor Oaks Trace, N.E., Marietta, Cobb County, Georgia.

4.

Defendant TIMOTHY MESCON is a resident of Fulton County, and may be served at his place of residence located at 320 Seamarsh Court, Atlanta, Fulton County, Georgia 30328.

5.

Defendant TERESA J. COVIN, a/k/a TERESA JOYCE, is a resident of Fulton County and may be served at her residence located at 1352 Middlesex Avenue, Atlanta, Fulton County, Georgia 30306.

6.

This Court has jurisdiction over the claims asserted herein and Plaintiff has served an ante litem notice on the Board of Regents and the Department of Administrative Services as required by O.C.G.A. Section 50-21-26 (a copy of which is attached hereto as Exhibit "A"), and venue is proper herein by virtue of the resident defendants and the fact that all tortious conduct attributable to the employees of the Board of Regents occurred at its KSU campus location in Cobb County, Georgia.

FACTUAL BACKGROUND

7.

Professor Lapides first received notice of a formal student complaint filed against him on August 1, 1997, in a letter from Melvis E. Atkinson, Minority Affairs Coordinator at KSU. The complaint made specific allegations that Plaintiff engaged in sexual harassment of a student.

8.

While Ms, Atkinson's investigations did not find any evidence to corroborate a single allegation made by the student complaintant, the investigation and all follow-up procedures associated therewith have resulted in an on-going course of conduct which has defamed Plaintiff in his profession; resulted in numerous violations of his due process rights and those rights guaranteed to him under KSU's own policies and procedures, violating his liberty and property interests in his constitutionally protected right to practice in his profession.

9.

KSU, through the persons of Defendants RUGG and COVIN have caused improper and defamatory material to be filed in the personnel record of the Plaintiff which currently makes it impossible for him to survive a background check for consideration of any Board of Directors or Board of Advisors positions for which he is routinely considered, or any academic, consulting or other professional employment opportunities.

10.

Documentation of the defamatory material involving an alleged "informal complaint" of inappropriate conduct supposed to have occurred in April 1996, is clearly based upon fabricated documents prepared by COVIN and improperly diseminated to others, including RUGG who makes reference to the false allegations in his March 12, 1999 letter which is now a part of Professor Lapides' personnel records at KSU. (See Exhibit "B" attached hereto and incorporated herein by reference).

11.

COVIN's use of fabricated documents to defame Plaintiff, and RUGG's use and publication of this information after he knew or should have known of it origins, constitutes a malicious defamation of Plaintiff with knowledge of the false nature of the statements.

12.

Placement of the aforesaid "libelous matter" in Plaintiff's personnel records by RUGG with actual or constructive knowledge of COVIN's falsification of said records, constitutes a conspiracy by RUGG and COVIN to defame Professor Lapides, making each liable for the acts of the other.

13.

That following the disseminastion of defamatory statements to others within the academic community who had no right or need to receive such information from RUGG, MESCON or COVIN, Plaintiff was treated with contempt and was held out to public ridicule amongst his colleagues and the staff at KSU.

14.

That the placement of said defamatory writings in the personnel file of the Plaintiff and in other public KSU files subjects Professor Lapides to the further injustices identified in Colonial Stores vs. Barrett, 73 Ga.App. 839, 38 S.E.2d 306 (1946), by compelling him to publish the defamatory information every time he is considered for a position on a board of directors, board of advisors, at any academic institution or

public corporation.

15.

The maintenance and use of the defamatory writings referred to above violates KSU's policies paragraph XLII, titled: "Procedures For Handling Student Complaints Against Faculty Members" wherein it states:

> "The faculty member will receive copies of anv written documents produced during the complaint resolution (at any level) and will be given the opportunity to respond to each document." emphasis added

16.

The first notice Professor Lapides ever received of the existence of any written documents concerning the "informal complaint" referred to above was when the falsified documents were produced in response to an open records request he made to KSU during the process of his defense of the "formal complaint" filed against him over two years after the documents were alleged to have been created.

17.

It is undisputed that COVIN's written documents were never shown to Plaintiff at the time the informal complaint was made and he was never given an opportunity to respond to the false and defamatory content of the documents.

18.

That upon discovering the existence of abuses in the university system at KSU involving the investigation of student complaints against faculty members and trying to secure assistance from superiors to correct the abuses; Plaintiff's employment at KSU was threatened, he was turned down for promotion and he received a disproportionately lower raise than other individuals similarly situated. These actions were taken despite Professor Lapides' evaluations which consistently judged him to be at or above expectations, in all categories of his work at KSU.

19.

That as a result of the manner in which supervisory personnel have treated Professor Lapides, he is currently being subjected to a hostile work environment and has suffered from the intentional infliction of emotional distress causing him to seek medical attention for the physical damage resulting to him.

20.

The use of falsified documents to defame him and bring his professional reputation into disrepute, the disparate treatment he has received at the hands of his immediate supervisor COVIN, the job threats and warnings to colleagues to disenfranchise themselves from Plaintiff, indicate that the behavior complained of and is described herein by RUGG, MESCON and COVIN is willful, wanton and intentionally directed toward harming Professor Lapides.

21.

As a result of Professor Lapides' reputation in the business community, his membership on several boards and organizations promoting the advancement of women and minorities in the corporate arena and his numerous articles on the subject, the content of the defamatory material involved herein is clearly of a nature so as to naturally humiliate, embarrass and outrage the Plaintiff.

22.

As a direct result of the cumulative effects of the foregoing acts and omissions by KSU personnel. Professor Lapides has been placed on medication to help him deal with the inordinate stress brought on by the conduct of the Defendants.

23.

That the allegations of written and oral defamation contained herein were specifically calculated to injure Plaintiff and damage his reputation within his profession as an author, consultant and expert in the field of corporate governance, and as a professor and lecturer in this area.

24.

That the placement of the aforesaid information into the Plaintiff's personnel file constitutes an invasion of privacy which portrays Plaintiff in a false light and subjects him to public disclosure of embarrassing facts.

25.

Defendants' tortious actions warrant the award of punative damages and expenses of litigation including, but not limited to, an award of attorneys fees for the prosecution of this action.

26.

Plaintiff also seeks a judicial finding that the items which have been placed in the public records of KSU are defamatory to Plaintiff, thereby giving rise to a new cause of action by Plaintiff against Defendants every time this information is published to a new party.

27.

Concurrent with the filing of this Complaint, Plaintiff is also filing a complaint with the Equal Employment Opportunity Commission based upon claims of disparate and discriminatory treatment against him on the basis of religion, gender and for retaliation. Upon the receipt of the appropriate authorization, it is anticipated that these claims will be added to the within and foregoing complaint as an amendment.

WHEREFORE, Plaintiff prays:

(a) That this Court take jurisdiction over the matters presented herein;

(b) That Plaintiff be awarded damages as compensation for his claims in an amount in excess of $1,000,000.00;

(c) That Plaintiff be awarded punative damages in an

amount to be determined by the enlightened conscious of the jury;

(d) That Plaintiff be awarded his reasonable expenses of litigation including, but not limited to, attorneys fees; and

(e) For such other and further relief as the court deems just and proper.

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GEORGIA CODE

9-11-41 (a) *Voluntary dismissal; effect:*
(1) BY PLAINTIFF; BY STIPULATION. Subject to the provisions of subsection (e) of Code Section 9-11-23, Code Section 9-11-66, and any statute, an action may be dismissed by the plaintiff, without order or permission of court:
(A) By filing a written notice of dismissal at any time before the first witness is sworn; or
(B) By filing a stipulation of dismissal signed by all parties who have appeared in the action.
(2) BY ORDER OF COURT. Except as provided in paragraph (1) of this subsection, an action shall not be dismissed upon the plaintiff's motion except upon order of the court and upon the terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him or her of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.
(3) EFFECT. A dismissal under this subsection is without prejudice, except that the filing of a second notice of dismissal operates as an adjudication upon the merits.

Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

No. 04-1643

In The Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a petitioner who raises only one of multiple grounds upon which an adverse judgment is based presents an issue for review on appeal?

2. Whether an employment discrimination plaintiff may in violation of res judicata, as uniformly understood by all circuits, split his cause of action by pursuing a separate Title VII suit after receiving a right-to-sue letter when a prior suit against the same defendant based on the same facts has resulted in an adverse determination on the merits?

3. Whether a petitioner may seek an equitable exception to res judicata when he failed to raise the issue in the lower courts and presents no good reason for such an exception?

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BRIEF IN OPPOSITION

The Court should deny the petition for the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered December 27, 2004.

OPINIONS BELOW

In addition to the opinions and orders cited by Petitioner, the district court in two unpublished orders dated September 8, 2000 and January 26, 2001 in Lapides' first suit, *Lapides v. Board of Regents*, Civil Action No. 1:00-cv-953-TWT (N.D. Ga.), dismissed on their merits the federal law claims against the individual defendants and then the state law claims against them as well. (Record 6-89-Ex. F, at 16-21; R6-89-Ex. G, at 5). The dismissal of the state law claims was appealed by Lapides to the Eleventh Circuit, which upheld the order in an unpublished opinion. (Record 6-89-Ex. H, at 4-7).

STATEMENT OF THE CASE

PARTIES

Petitioner Paul D. Lapides, a self-described Messianic Jew, has been employed as an Assistant Professor of Management in the Coles College of Business at Kennesaw State University ("KSU") since 1993. (App. 87a, 92a: Record 6-18-Ex. B at ¶ 4, Discovery Docs. D 199). Lapides has a Bachelor of Science in economics and a Masters of Business Administration. He does not have terminal (doctorate) degree and has no plans to pursue one. (R6-89-Ex. B at

¶ 4, Discovery Docs. PL 01083-84; Docket No. 73 (Lapides Dep.)-276).

Respondent Board of Regents of the University System of Georgia ("University System") is the state entity responsible for the "government, control, and management of the university system and all of its [public] institutions." Ga. Code Ann. § 20-3-51. KSU is a large public four-year university located in Kennesaw, Georgia, offering a variety of undergraduate and graduate level programs and degrees. (Record 6-89-Ex. A at ¶ 3). The Coles College of Business is the KSU business school. (Record 6-89-Ex. A ¶ 4).

LAPIDES' TWO SUITS

Lapides filed his first suit against the University System, along with several of its administrative officials, on March 9, 2000, in Cobb County (Georgia) Superior Court. (Record 6-89-Ex. D). Lapides alleged that university officials placed allegations of sexual harassment against him in his personnel files, and as a result were liable under both Georgia law and 42 U.S.C. § 1983. (Record 6-89-Ex. D, at ¶¶ 7-27).

The instant case is Lapides' second suit against the University System. Lapides filed it September 24, 2001. (App. 87a).

In the complaints in both suits, Lapides alleged most of the same facts. These included the allegedly inadequate investigation of one or more student sexual harassment complaints against him and the placement of material in KSU files. (Record 6-89-Ex. D at ¶¶ 7-24).

Lapides also alleged in the first suit that he was filing an EEOC charge. He pled:

> Concurrent with the filing of this Complaint, Plaintiff is also filing a complaint with the Equal Employment Opportunity Commission based upon claims of disparate and discriminatory treatment against him on the basis of religion, gender and for retaliation. Upon the receipt of the appropriate authorization, it is anticipated that these claims will be added to the within and foregoing complaint as an amendment.

(Record 6-89-Ex. D at ¶ 27).

However, Lapides did not file a charge of discrimination with the EEOC concurrent with his first complaint. (App. 61a, 91a; Record 1-1-¶ 5, Tab 1). Rather he waited until August 29, 2000 to sign it. (App. 60a-61a). In his EEOC charge, Lapides alleged retaliation and discrimination on the basis of sex and religion. (App. 91a). Lapides received a right-to-sue letter on June 26, 2001. (App. 91a). He then filed the present suit on September 24, 2001. (App. 87a). Instead of seeking to amend the first suit, Lapides saved his Title VII claims for the present suit.

The first suit was removed to federal court. (Record 6-89-Ex. E). Ultimately, after trips to the Eleventh Circuit and Supreme Court, it was held that the federal claim against the University System was not barred by Eleventh Amendment immunity. *Lapides v. Board of Regents*, 251 F.3d 1372 (11th Cir. 2001), *rev'd*, 535 U.S. 613 (2002). However, the district court dismissed on their merits the federal law claims against the individual defendants and then the state law claims against them as well. (Record 6-89-Ex. F, at 16-21; Record 6-89-Ex. G, at 5). The dismissal

of the state law claims was appealed and upheld by the Eleventh Circuit. (Record 6-89-Ex. H, at 4-7).

As discussed in more detail below, the Supreme Court held that Lapides' federal claim under 42 U.S.C. § 1983 against the State could not be sustained in light of a previous Supreme Court holding that a State is not a "person" against whom a § 1983 claim can be asserted. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 616 (2002) (*citing Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989)). Hence, all of Lapides' federal claims against the University System in his first case were adjudicated by this Court in what must be considered a final judgment on the merits.

There were then three decisions on the merits of claims pled by Lapides in his first case:

1. the dismissal of his federal claims against the individual defendants,

2. the dismissal of his state law claims against the individual defendants, and

3. the dismissal of his federal claims against the University System.

Regarding Lapides' federal claims against the University System, this Court ruled:

> [B]ecause Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). [cit. omitted]. Hence ***this case does not present a valid federal claim against the***

> ***State***. . . . It has also become clear that, in the absence of any viable federal claim, the Federal District Court might well remand Lapides' state-law tort claims against the State to state court. 28 U.S.C. § 1367(c)(3).

Lapides v. Board of Regents, 535 U.S. at 617 (emphasis added); *id.* at 624 (concluding "that this case, now rais[es] only state-law issues"). On this basis, the Supreme Court issued its judgment. (Record 9-105-Ex. P).

Recognizing that the Supreme Court had "held that the Plaintiff had no valid federal claims pending," the district court then remanded to state court the remaining state law claims against the University System. (Record 6-89-Ex. I at 3). The district court also noted that "[a]ll federal claims ha[d] been dismissed." (*Id.*) The court thus held that in his prior suit Lapides' federal claims against the University System were in fact adjudicated on their merits.

The decision of the Supreme Court served as the ultimate judgment in Lapides' first case. (Record 9-105-Ex. P). The mandate of the Eleventh Circuit recognized that, after the Supreme Court's judgment, "only state-law claims remain." (Record 9-105-Ex. Q). It was only the remaining state claims that were eventually dismissed by Lapides "without prejudice" after remand. (Record 6-89-Ex. J).

As the district court observed (Record 9-116-51 n.14; Record 10-126-4-5), Lapides' counsel stated at the summary judgment hearing that there had been a ruling on the merits of the § 1983 claim:

> So whether we have a ruling on the merits on the 1983 action, I think we ultimately do,

> although I think it comes about in a funny way, but I think ***we do have a ruling on the merits at least as to the 1983 claim***.

(Record 11-125-27) (emphasis added).

In his suits, Lapides alleged a string of discriminatory and retaliatory acts based on his religion, ethnicity, and speech. As the district court concluded, none of these contentions has merit. The allegedly wrongful acts are summarized under the following headings.

PROMOTION AND TENURE

After four years at KSU, Lapides applied in September 1997 for tenure, to be effective in academic year 1998-1999. He was granted tenure, as was recommended by all five required levels of review. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. D 1571).

In August 1998, just when his tenure became effective and less than one year after applying for it, Lapides applied for promotion from assistant to associate professor for academic year 1999-2000. (Docket No. 73 (Lapides Dep.)-271, 274; Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 01068, 01072; Record 6-89-Ex. A at ¶ 8).

The KSU policy in effect at the time stated specifically that an assistant professor generally would not be promoted unless the professor showed "substantial progress" toward a doctorate. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 02130, 02231). Lapides was denied promotion because he did not have a doctorate and had made no progress toward one. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. D 1371-76).

At KSU, all 13 of the applicants seeking promotion from assistant to associate professor for academic year

1999-2000 who were in fact promoted had terminal degrees. (Record 6-89-Ex. A at ¶¶ 13-16, 20, attached documents). Five of the seven applicants who were denied promotion, including Lapides, did not hold doctoral degrees and only possessed masters. The other two applicants had doctoral degrees but were denied on other grounds. (Record 6-89-Ex. A at ¶¶ 13-16, 20, attached documents).

SEXUAL HARASSMENT COMPLAINTS

Clay Complaint

In 1996, Velvet Clay, a female student at KSU, took an evening course from Lapides. (Docket No. 92 (Clay Dep.)-7-8). One night after class, Lapides called Clay at her home. (Docket No. 73 (Lapides Dep.)-79; Docket No. 92 (Clay Dep.)-10). Clay alleged that during the telephone call he told her she was attractive, asked about her sexual preferences, asked if she "was into S & M," and stated that he didn't know if he could continue to conduct the class because her beauty distracted him. (Docket No. 92 (Clay Dep.)-11-12). It is undisputed that Lapides called Clay on at least one other occasion, although they disagree as to the contents of the call. (Docket No. 72 (Lapides Dep.)-125). Clay said that Lapides called to apologize for his comments. (Docket No. 92 (Clay Dep.)-20).

After the phone calls, Clay contacted Terri Lavelle, Administrative Coordinator to Dean Timothy Mescon. (Docket No. 92 (Clay Dep.)-19). Clay asked for guidance regarding what to do and how to get out of the class. (Docket No. 92 (Clay Dep.)-22). Lavelle told Clay to contact Teresa Joyce-Covin, Ph.D., Chair of the Department. (Docket No. 92 (Clay Dep.)-22). Clay contacted Joyce-Covin

and explained the situation. Joyce-Covin arranged for Clay to finish the course by independent study, and Clay did not return to Lapides' class. (Docket No. 92 (Clay Dep.)-24-25; Docket No. 51 (Joyce-Covin Dep.)-96).

Clay chose not to file a formal complaint. Clay testified that her main concern was graduating, and she did not want to be involved in a formal sexual harassment investigation or complaint. (Docket No. 92 (Clay Dep.)-30, 60). Lapides testified that he had no reason to believe that Clay, in complaining about him, was motivated by anti-Semitism. (Docket No. 73 (Lapides Dep.)-113).

Lunn Complaint

In July 1997, Laurie Lunn a former student of Lapides, who had graduated from KSU in May 1997, contacted Joyce-Covin and informed her of allegedly inappropriate statements and conduct by Lapides during a course she had taken from him in the fall of 1996. (Docket No. 91 (Lunn Dep.)-10-12; Docket No. 51 (Joyce-Covin Dep.)-54).

Joyce-Covin met with Lunn and referred her to KSU EEO officer Melvis Atkinson, Ph.D. (App. 96a-97a). Lunn met with Atkinson and filed a formal notarized complaint of sexual harassment against Lapides. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 5361-62, 5384-87; Docket No. 91 (Lunn Dep.)-7-8, 13).

Lunn complained that during class Lapides spoke of his sex life, experiences in dating, visiting bars and picking up women, men soliciting hookers, his need to be in control over women, the fact that women always complain, overseas practices in which women are burned when their husbands die and female babies are killed, blaming

women if they are harassed and do not say anything about it, and a conversation two men had about women's underwear. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 02050-51).

Atkinson interviewed Lapides, Joyce-Covin, and eight of the students who had been in Lunn's class. (App. 100a; *Compare* Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 03693 *with* PL 05379). The students generally did not support Lunn's allegations. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05379). One female student, Julie Burtz, did support the allegation that before class and at the end of class Lapides talked about going to bars and picking up women. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05379).

On August 28, 1997, Atkinson completed her investigation and wrote Lapides stating that "[t]his office has completed its investigation of the charge of sexual harassment brought against you. . . . Evidence gathered during the investigation did not support the claim of a sexually hostile environment alleged to have been part of [your] class." Atkinson added, "there was at least one other student in the class who had concerns about your conduct, joke telling, before and end of the class lectures. In light of this, I suggest that at all times you display a professional educational atmosphere. . . . " Atkinson requested that Lapides make an appointment with her office to view an educational video on sexual harassment. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 02058, 05388-89, D 532).

On August 29, 1997, Atkinson met with Lapides and told him the findings of her investigation, that the evidence gathered did not support the claim of sexual harassment. (App. 100a; Exhibit B at ¶ 4, Discovery Docs. PL

05379). Lapides expressed to Atkinson his concern that the letter was insufficient clearance. Lapides "kept insisting that [Lunn] had defamed him." (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05380). Lapides stated that he did not know why Lunn would do this except because he is Jewish. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05380). Atkinson said that as far her office was concerned the investigation was over, and she had no indication that anyone involved was motivated by Lapides' race or religion. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05380).

Lunn testified that she was not aware that Lapides was Jewish at the time of her complaint against him, during the investigation, or even later. (Docket No. 91 (Lunn Dep.)-40). Furthermore, Lunn testified that she has no bias towards Jewish people and that Lapides' religion and ethnicity had nothing to do with her complaint. (Docket No. 91 (Lunn Dep.)-40).

Buckalew Complaint

On November 17, 1998, Ken Robinson, Ph.D. ("Robinson"), another KSU Coles College professor, faxed a "draft" memorandum to Mescon dated November 12, 1998. The memorandum alleged that Lapides had an inappropriate conversation with a "former student" of Robinson's, who was later identified as Mindy Buckalew, regarding Robinson's sexual habits and requested Lapides' dismissal. (App. 114a). Mescon reviewed the memo, placed it in a file, but took no action regarding it, nor did he share its contents with others. (Docket No. 47 (Mescon Dep.)-149-50).

On November 28, 1998, Mescon, Devine, Joyce-Covin, and Lavelle met with Buckalew to discuss her allegations of possible assault and sexual harassment by Lapides and

concerns for her safety. (Docket No. 52 (Devine Dep.)-228-30, 240-44; Docket No. 47 (Mescon Dep.)-157-58). Ted Cochran, KSU Chief of Police, attended a portion of the meeting and advised Buckalew that she should contact the Cobb County Police Department ("CCPD") since the alleged assault took place off campus. (Docket No. 68 (Cochran Dep.)-50-51).

Buckalew never filed a complaint with KSU. (Docket No. 93 (Buckalew Dep.)-90, 196). Thus, KSU took no action. Cochran never formally investigated any complaints by Buckalew although he obtained a copy of the police report filed by Buckalew with CCPD. (Docket No. 68 (Cochran Dep.)-22, 25-26).

On December 12, 1998, Buckalew went to CCPD and filed a complaint against Lapides alleging that she had received phone calls from Lapides that were sexual in nature, that Lapides assaulted her, and put a gun in her mouth. The Cobb County police were unable to substantiate Buckalew's claims and the case did not proceed. (Docket No. 93 (Buckalew Dep.)-14; Record 6-89-Jt. Dep. Ex. 24).

OTHER ALLEGED ACTS OF DISCRIMINATION AND RETALIATION

Proposed Reassignment of a Graduate Class

In August 1998, Department Chair Joyce-Covin proposed that Lapides' only graduate course be reassigned to another professor, Carlotta Roberts. (App. 112a; Docket No. 51 (Joyce-Covin Dep.)-245). While Joyce-Covin was finalizing the schedule of courses to be offered, she determined that there were too many entrepreneurship electives being

offered for the spring term. Therefore, Joyce-Covin moved the Lapides course to the summer term and, because Lapides had already made clear he did not want to teach during the summer, Joyce-Covin asked Roberts to teach the course. (Docket No. 51 (Joyce-Covin Dep.)-245). After some of Lapides colleagues told Joyce-Covin that they thought Lapides should teach the course, she moved the course to the fall term and allowed Lapides to teach it. (Docket No. 51 (Joyce-Covin Dep.)-245-46). Lapides agreed that the proposed reassignment, which was not put into effect, had no effect on the compensation, benefits, or terms of his employment. (Docket No. 73 (Lapides Dep.)-277-78).

Changes in Track Assignment

Coles College at KSU has three workload tracks:

> Track A the teaching-service model, which requires more teaching and less intellectual contributions than would otherwise be expected;
>
> Track B the teaching-scholarship-service model, which requires a balance of teaching and scholarship and hence a lower course load; and
>
> Track C the teaching-scholarship model, which requires the highest intellectual contributions and the lowest course load.

(Docket No. 47 (Mescon Dep.)-48-54; Record 1-89-Jt. Dep. Ex. 41; Record 1-89-Ex. B at ¶ 4, Discovery Docs. D 59).

Faculty in the School of Business Administration can select, subject to approval by the department chair, one of the three workload options. (Docket No. 47 (Mescon Dep.)-58-62). According to Mescon, "[P]art of the departments

'chair's responsibility is to see that the mix of workload options selected by the faculty allows the department to accomplish the mission of the School of Business Administration . . . ,' which means each chair has to assure some type of balance among his or her faculty regarding faculty workload assignments in each department. . . . It is the chair's administrative responsibility to make these assignments." (Docket No. 47 (Mescon Dep.)-62).

When Lapides was originally hired by KSU, he was on Track A, the teaching-service track. (Docket No. 51 (Joyce-Covin Dep.)-216; Docket No. 59 (Lasher Dep.)-30-31). Lapides was later allowed to purchase course releases with contract money he had, giving him a course load similar to Track B. (Docket No. 51 (Joyce-Covin Dep.)-217-18). When KSU converted to the semester system in the fall of 1998, Joyce-Covin notified the faculty that the department would no longer support course releases and everyone would be required to teach his or her specified load. (Docket No. 51 (Joyce-Covin Dep.)-218).

With the conversion, Lapides would have been expected to return to a Track A course load. (Docket No. 51 (Joyce-Covin Dep.)-218). However, Lapides and Joyce-Covin decided jointly to move Lapides to Track B with the understanding that he must meet the intellectual contribution requirements. (Docket No. 51 (Joyce-Covin Dep.)-222; Record 1-89-Ex. B at ¶ 4, Discovery Docs. PL 06660-61, 05446).

In March 2000, Harry Lasher, Ph.D., the new Department Chair, reassigned Lapides to Track A based on the department's needs and the fact that Lapides was originally hired under Track A. (Docket No. 59 (Lasher Dep.)-39). In fairness, Lasher allowed Lapides another

year on Track B to finish up his research. (Docket No. 59 (Lasher Dep.)-39-41; Exhibit B at ¶ 4, Discovery Docs. PL 06087-89).

At the time of his deposition, Lapides believed he should be on Track B. (Docket No. 73 (Lapides Dep.)-262). However, he claimed that, when he was reassigned to Track B by Joyce-Covin, he objected to the change. (Docket No. 73 (Lapides Dep.)-262; Record 1-89-Ex. B at ¶ 4, Discovery Docs. PL 06046).

Performance Rating

In his February 1999 review, Lapides was rated "Above Expectations" in teaching and service, but "At Expectations" for intellectual contributions. His overall rating was "Above Expectations." (App. 121a; R1-89-Ex. B at ¶ 4, Discovery Docs. PL 06058-60).

Proposed Reassignment to Administrative Job

In January 2000, Lapides became ill and missed three weeks of classes. (App. 127a-128a). He was informed that if he missed 20% of his classes he would be reassigned to an administrative position for the remainder of that term. (App. 128a-129a).

Lapides complained to Mescon and Lasher that any such reassignment would be motivated by anti-Semitism and retaliation. (App. 130a). Lapides made this accusation although Mescon is a prominent and devout Jew. (Docket No. 47 (Mescon Dep.)-236).

Lapides returned to work, met with Mescon and Lasher, and was allowed to continue teaching without

being reassigned to administrative duty. (Docket No. 47 (Mescon Dep.)-292). The proposed reassignment, which was not implemented, had no effect on the terms or conditions of Lapides' employment.

REASONS FOR DENYING THE WRIT

I. HAVING FAILED TO APPEAL ALL OF THE GROUNDS UPON WHICH THE DISTRICT COURT BASED ITS GRANT OF SUMMARY JUDGMENT, LAPIDES PRESENTS NOTHING FOR REVIEW.

In the Eleventh Circuit and in his petition to the Supreme Court, Lapides has appealed only from the district court's grant of summary judgment on the basis of res judicata. Lapides has not appealed from the district court's grant of summary judgment on the alternative grounds that his discrimination and retaliation claims fail on their merits. Lapides tells the Court that the district court's ruling on the merits is "not material to this Petition." (Petition at 8 n.1). He is seriously mistaken.

The district court adopted the magistrate judge's conclusions that, as to his discrimination claim, Lapides could not show that "the alleged acts were motivated by religious discrimination" and that "Plaintiff has not satisfied his *prima facie* case of hostile work environment based on his religion, and therefore **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED** as to Plaintiff's Title VII religious discrimination claim." (App. 11a, 68a, 76a) (emphasis original).

Similarly, as to Lapides' Title VII retaliation claim, the district court adopted the magistrate judge's conclusions that adverse summary judgment be granted inasmuch as Lapides did not engage in protected activity and did not suffer an adverse employment action. Thus, the district court adopted the following conclusion: "Plaintiff has not made out a prima facie case of retaliation and therefore [the Magistrate Judge] **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED** with respect to Plaintiff's retaliation claim." (App. 11a, 85a) (emphasis original).

Normally, an appellant appeals from and raises issues as to all grounds upon which the district court based its judgment. *See, e.g., Scott v. Prudential Securities, Inc.*, 141 F.3d 1007 (11th Cir. 1998) ("Scott also appeals the district court's alternative holding"). Moreover, the appellate court usually addresses all of the bases for the lower court's decision. *See, e.g., Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 76-77 (1994) (addressing "the Court of Appeals' alternative basis for striking down the New York scheme"); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 430 (1992) (addressing "[t]he Court of Appeals' alternative holding"); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889-90 (1990) (same); *U.S. Dept. of Labor v. Committee on Legal Ethics of the West Virginia State Bar*, 494 U.S. 715, 727 (1990) (same); *Federal Maritime Commission v. Pacific Maritime Ass'n*, 435 U.S. 40, 41 (1978) ("[t]he Court of Appeals also erred in its alternative ground of decision"); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141 (1968) ("[t]here remains for consideration only the Court of Appeals' alternative holding"), *overruled on other grounds, Copperweld Corp. v. Independence Tube*

Corp., 467 U.S. 752, 783-84 (1984); *Miami Heart Institute v. Sullivan*, 868 F.2d 410, 412 n.2 (11th Cir. 1989) (addressing and finding district court's "alternative holding" erroneous).

Lapides has failed adequately to appeal the district court's judgment against him. By failing to appeal all of the grounds adopted by the district court (but instead appealing from only one of them), Lapides in effect concedes that the lower court's decision was correct. In other words, if one unplugs the res judicata ground from the district court's judgment, the decision still stands on the basis of other grounds, as to which Lapides has not appealed. This is a simple matter of logic. He has thus failed to perfect his appeal and presents nothing for review.

The Fifth Circuit recognized this principle in *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. Unit A 1981). The court acknowledged that "one alternative ground will support the judgment." *Id.* at 1168. Therefore, according to the court, "the losing litigant has little incentive to appeal another ground even if erroneous." *Id.* In other words, because a single ground will support a court's judgment, it makes no sense for a party to appeal a putatively erroneous ground unless the party can show that all the grounds are erroneous.

Lapides' failure to raise in the Eleventh Circuit or his petition to this Court any issue as to the district court's alternative holdings is fatal to his appeal. And it is too late now for Lapides to appeal the alternative grounds supporting the judgment. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

II. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT LAPIDES HAD IMPERMISSIBLY SPLIT HIS CAUSES OF ACTION AND HIS SECOND SUIT IS BARRED BY RES JUDICATA.

The district court correctly based its grant of summary judgment in part on res judicata and the Eleventh Circuit correctly affirmed on this basis. (App. 1a-4a. 8a-11a, 62a). Unlike Lapides' contentions, the lower courts did not misapply the doctrine.

In order for res judicata to apply, there must have been a prior suit involving the same parties, the same issues must have been raised or it must be true that they could have been raised, and there must have been a decision on the merits as to some issue. *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 2500 (2005) ("'Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" (*quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980))).

As the lower courts held in the present case, all of the requirements of res judicata are met here. Lapides filed a prior suit against the University System in which he could have raised the Title VII issues he presents in this second suit. Even though Lapides had not received a right-to-sue letter when he filed his first suit, case law strongly supports the conclusion that he could have raised his Title VII claims in that suit and res judicata therefore applies.

Res judicata has consistently been applied where employment discrimination plaintiffs, who have not yet obtained a "right-to-sue" letter, failed to bring Title VII

claims in a prior suit arising from the same events. Courts have reached this result even though one may not file a Title VII claim without a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). In *Jang v. United Technologies Corp.*, 206 F.3d 1147 (11th Cir. 2000), which the Eleventh Circuit followed in the instant case (App. 1a-4a), the plaintiff filed an initial complaint raising several claims, including violations of the Americans with Disabilities Act ("ADA"). *Id.* at 1148. The district court granted summary judgment against the plaintiff. It rejected the ADA claim because the plaintiff had not obtained a right-to-sue letter and disposed of the remaining claims on other grounds. The plaintiff then obtained a right-to-sue letter and filed a second suit. The Eleventh Circuit held that the ADA claim was barred by res judicata even though the plaintiff could not have properly raised it in is first suit due to the absence of a right-to-sue letter. The court noted that, even if one regarded the dismissal of the ADA claim in the first suit as not being on the merits, the district court had granted summary judgment on the merits of the other claims. According to the court, res judicata or claim preclusion does not allow a plaintiff to "split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a 'right to sue' letter." *Id.* at 1148-49.

In *Jang*, the Eleventh Circuit cited and followed cases from three other circuits (the Second, Sixth, and Seventh):

> At least three other Circuits have rejected similar arguments and held that plaintiffs may not split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a "right to sue" letter. *See Heyliger v.*

> *State Univ. & Community College Sys. of Tenn.*, 126 F.3d 849, 855-56 (6th Cir. 1997) (noting that plaintiff had duty to request right to sue letter and amend state complaint); *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 339 (7th Cir. 1995) (explaining that plaintiff could not split causes of action and bring a federal claim later); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2nd Cir. 1992) (stating that plaintiffs may avoid claim preclusion by filing their other claims and seeking a stay to await the Title VII administrative proceeding or by filing the other claims and then amending after obtaining the right to sue letter). In the most analogous case, *Rivers v. Barberton Board of Education*, 143 F.3d 1029 (6th Cir. 1998), the Sixth Circuit affirmed the application of res judicata to bar a suit involving a Title VII claim after the court had dismissed a factually related federal claim on the merits in a prior suit between the parties. *See Rivers*, 143 F.3d at 1032. We agree with these other Circuits, and the district court in this case, and hold that res judicata barred Appellant from splitting his causes of action and bringing his ADA claim after his first suit proceeded to a judgment on the merits.

Id. at 1149.

The Ninth Circuit reached the same conclusion in *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708 (9th Cir. 2001). The plaintiffs' Title VII claims were dismissed on res judicata grounds inasmuch as the plaintiffs had filed a prior action based on the same facts that was dismissed with prejudice. *Id.* at 710-11. The plaintiffs contended that their new Title VII suit was not barred by res judicata because they had not yet received right-to-sue

letters. Citing other circuits (the First, Second, Third, Sixth, Seventh, and Eleventh) that have reached the same conclusion, the Ninth Circuit ruled:

> Finally, Appellants argue that res judicata cannot apply because they were barred from bringing their Title VII claims in the previous action in light of the fact that they had not yet received their "right to sue" letters from the EEOC. Though we have never addressed this issue in a published opinion, we now join our sister circuits in holding that Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims. *See Heyliger v. State Univ. & Cmty. College Sys. of Tenn.*, 126 F.3d 849, 856 (6th Cir. 1997) (holding that plaintiff was subject to claim preclusion because he failed to litigate a Title VII claim in a prior state court proceeding); *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 225-26 (7th Cir. 1993) (stating that "[p]arties to Title VII actions enjoy no immunity from res judicata"); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 40-41 (2nd Cir. 1992) (Title VII claim not exempt from res judicata where plaintiff made no effort in prior action to seek a stay from the district court or amend her complaint to include Title VII claim); *see also Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000) (Title VII claim subject to res judicata where plaintiff received right to sue letter during pendency of first action); *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000) (adopting Title VII analysis and concluding that ADA claim was not exempt from res judicata where plaintiff failed to

> obtain right to sue letter during pendency of first action); *Churchill v. Star Enters.*, 183 F.3d 184, 193-94 (3rd Cir. 1999) (same).
>
> Appellants had ample time to secure "right to sue" letters prior to filing their first action in November of 1995. Alternatively, they could have sought a stay from the district court pending their administrative proceedings before the EEOC. In light of Appellants' failure to exercise either option, we conclude that their Title VII claims are barred by the doctrine of res judicata.

Id. at 714. *See also Havercombe v. Dep't of Educ. of Puerto Rico*, 250 F.3d 1, 4-8 (1st Cir. 2001). Because the plaintiffs in *Owens* failed to secure right-to-sue letters at an earlier time and failed to seek a "stay from the district court pending their administrative proceedings before the EEOC," their Title VII claims were barred by res judicata. *Owens*, 244 F.3d at 714.

Summarizing, at least seven circuits have now held that Title VII plaintiffs are subject to res judicata when they try to bring separate suits for Title VII violations. Respondent is aware of no circuits that have held to the contrary. Title VII plaintiffs cannot, therefore, bring separate suits based on the same facts and avoid the effect of res judicata from prior suits by alleging that they had not yet received right-to-sue letters at the time of the prior suits.

The circumstances are more compelling here than in *Jang* and *Owens* for the application of res judicata inasmuch as Lapides obtained a right-to-sue letter while his first suit was pending. Nevertheless, Lapides failed to move to amend so as to add the Title VII claim, although he pled in his first suit that he would do so and the district

court found that he could have amended or moved to stay the case. (App. 10a-11a, 61a). In *Jang* and *Owens*, the plaintiffs did not obtain right-to-sue letters until after their first suits had been dismissed and thus, unlike Lapides, did not have the opportunity to amend. *Jang*, 206 F.3d at 1148; *Owens*, 244 F.3d at 711.

Lapides argues here that there was only a "partial judgment" on federal claims in his first suit. (Petition at (i), 12, 19).[1] He contends that the application of res judicata in these circumstances "vastly expands the contours of res judicata doctrine." (Petition at 12).

This argument is fallacious. It ignores federal courts' common practice of making determinations on the merits of federal claims and dismissing without prejudice or remanding state law claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n.7 (1988) ("when federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice"); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); 28 U.S.C. § 1367(c)(3) (a district court "may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction").

As shown above, an adverse decision on the merits was reached in Lapides' first case. In that case, Lapides' federal claims against the University System were decided

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[1] Riding a different horse, Lapides argued in the Eleventh Circuit that "There was no final judgment in this case upon which to base res judicata." (Brief of Appellant at 17).

against him. The United States Supreme Court ruled in *Lapides'* first case:

> [B]ecause Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). [cit. omitted]. Hence ***this case does not present a valid federal claim against the State***. . . . It has also become clear that, in the absence of any viable federal claim, the Federal District Court might well remand Lapides' state-law tort claims against the State to state court. 28 U.S.C. § 1367(c)(3).

Lapides v. Board of Regents, 535 U.S. at 617 (emphasis added); *id.* at 624 (concluding "that this case, now rais[es] only state-law issues"). This conclusion was part of the Supreme Court's judgment. (Record 9-105-Ex. P).

Recognizing that the Supreme Court had "held that the Plaintiff had no valid federal claims pending;" the district court then remanded to state court the remaining state law claims against the University System. The court also noted that "[a]ll federal claims ha[d] been dismissed." (Record 6-89-Ex. I, at 3). Therefore, in Lapides' first case, the district court held that his federal claims against the University System were in fact adjudicated on their merits.

Plainly, the decision of the Supreme Court served as the ultimate judgment in Lapides' first case. (Record 9-105-Ex. P). The mandate of the Eleventh Circuit recognized that, after the Supreme Court's judgment, "only

state-law claims remain." (Record 9-105-Ex. Q). These remaining state claims were eventually dismissed by Lapides "without prejudice" after remand. (Record 6-89-Ex. J).

As the district court recounted and as noted above, Lapides "conceded at the oral argument on Defendant's Motion for Summary Judgment that there was a decision on the merits of the § 1983 claim." (App. 62a n.14). Lapides' counsel stated: "[W]e do have a ruling on the merits at least as to the 1983 claim." (Record 11-125-27).

In *Jang*, the Eleventh Circuit correctly held that it is not necessary, in order for res judicata to apply, that a final judgment has been entered on all claims in the first case. *Jang v. United Technologies Corp.*, 206 F.3d 1147, 1148-49 (11th Cir. 2000) (even if the dismissal of the ADA claim in the first suit was not on the merits, res judicata applied because the district court had granted summary judgment on the merits of the other claims). In a recent Title VII case, the Seventh Circuit reaffirmed that a federal district court renders a final judgment for res judicata purposes when it dismisses some claims on the merits and dismisses other claims without prejudice. *Hill v. Potter*, 352 F.3d 1142, 1144 (7th Cir. 2003).

As the district court held, it is manifest that Lapides could have brought his Title VII claims in his first case against the University System:

> Plaintiff has not explained why he did not file his administrative charge earlier, or seek to stay the case upon filing it so that he could obtain the right-to-sue letter in order to prevent the

> splitting of actions which should have been brought together. Plaintiff's failure to obtain the right-to-sue letter until after a point at which it might have been procedurally impossible to stay the case or amend his complaint is no different from the predicament of those plaintiffs who failed to obtain the right-to-sue letter until after a point at which they could not stay the case or amend their complaint because the complaint had been dismissed. Accordingly, the undersigned finds that Plaintiff has not shown that he could not have brought his Title VII claims in the prior lawsuit.

(App. 10a-11a, 61a).

Thus, under controlling authority, Lapides' present suit under Title VII is barred by res judicata. All of the conditions exist that are necessary for res judicata to apply, including a decision on the merits in the prior suit.

III. LAPIDES DID NOT RAISE HIS EQUITABLE EXCEPTION ARGUMENT BELOW AND THERE IS NO REASON TO ADOPT IT.

Lapides now argues for the first time that an equitable exception to res judicata should be recognized in Title VII cases. This suggestion should be rejected as untimely and unwarranted.

Lapides did not argue in the lower courts that an equitable exception to res judicata should be recognized. As noted above, "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *See also*

Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Thus, the Court should refuse to entertain this argument.

Moreover, there is no reason to create an equitable res judicata exception to help Lapides or other non-diligent Title VII plaintiffs. As Lapides acknowledges, this Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), rejected equitable exceptions to res judicata based on "public policy" or "simple justice." *Id.* at 401. (Petition at 15-16). The Court reaffirmed: "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" *Moitie*, 452 U.S. at 401 (cit. omitted). And, as quoted above, the district court ruled (and there is no evidence to the contrary) that Lapides could have sought a stay or amended his first suit in order to present his Title VII claim there.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari, declining the invitation to unsettle the law of res judicata in order to aid a non-diligent litigant.

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No. 04-1643

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In The Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent's threshold objections to this Petition regarding ripeness and justiciability have no merit. Nor does Respondent's disparagement of the cert-worthiness of this application for review.

1. Respondent first asserts, see Brief in Opposition ("Op. Cert.") 15-17, that because Lapides allegedly failed to appeal all of the grounds upon which the district court based its judgment, review in this Court is precluded. This contention seriously misapprehends the record below, and misconstrues this Court's precedents as to the justiciability of claims. (Respondent also seriously mischaracterizes the underlying facts and allegations of Lapides' complaint, but it is not pertinent to this Petition).

To begin with, Lapides *did* reserve before the court of appeals his arguments concerning the district court's ostensible ruling on the merits of his employment claims (aside from the district court's ruling on res judicata). In briefing before the Eleventh Circuit, Lapides noted:

> In its order granting Defendant's motion for summary judgment, the District Court discussed only res judicata as the ground for granting the motion (*See* R10-126-3 to -4) [see also Pet. App. 7a-11a]. Although the District Court stated in the last paragraph of the order that it was adopting the Magistrate's Final Report and Recommendation (*See* id. at -5) [see also Pet. App. 11a], the District Court Judge did not discuss or reference the Magistrate Judge's alternative holdings in his

> order, and the alternative bases for recommending summary judgment in this case would be dicta in light of the District Court's adoption of the res judicata bar to the lawsuit. Therefore, Appellant has limited his argument in this brief to the res judicata issue. If the Court concludes that the District Court granted summary judgment on the alternative grounds articulated by the Magistrate Judge, Mr. Lapides respectfully incorporates by reference his Objection to the Magistrate's Final Report and Recommendation (*See* R10-122) and asks the Court to permit him to file a supplemental brief on the subject.

Brief of Appellant, *Lapides v. Board of Regents of the University System of Georgia*, at 1 n.1 (11th Cir. Docket No. 04-12161-H) (filed June 2004). See also Reply Brief of Appellant, id., at 2 (filed August 2004) (after quoting the above statement, Lapides observed that "there was no 'failure' to address all the grounds articulated by the District Court, as alleged by Appellee. Nor has Mr. Lapides conceded anything regarding the alternative recommendations of the Magistrate Judge.").

Not only did Petitioner completely preserve his position on the underlying merits issues before the court of appeals, it is manifestly clear from the Eleventh Circuit's decision that it concerns only the res judicata issue. See Pet. App. 1a ("The district court held that the suit was barred by res judicata."); 4a ("[T]he district court did not err in granting summary judgment to the Board based on res judicata."). Under this Court's precedents, Lapides was under no obligation to present to this Court a question not actually

resolved by the court of appeals below. See *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980).

2. Respondent also asserts, Op. Cert. 26-27, that Lapides failed to raise before the Eleventh Circuit his argument for an equitable exception to res judicata principles, as recognized by other Title VII cases. But this, too, is erroneous.

The main case relied upon by Lapides in his briefing before the court of appeals was the Eleventh Circuit's own decision in *Jang v. United Tech. Corp.*, 206 F.3d 1147 (11th Cir. 2000). See Brief of Appellant, supra, at (iii) (indicating, on Table of Authorities, *Jang* was a principal case). The *Jang* decision clearly recognized that there can be equitable exceptions to the application of res judicata principles in the Title VII/employment discrimination case context. See 206 F.3d at 1149 n.3 ("Appellant asks the Court to find manifest injustice or equitably modify the doctrine of res judicata on these facts. Appellant suggests that the alleged failings of the EEOC and the OFCCP prevented Appellant from receiving a "right to sue" letter. We see no basis for an equitable modification on the facts of this case.").

Also insofar as Lapides argued before the Eleventh Circuit that there is no res judicata preclusion in this case, see Reply Brief of Appellant, supra, at 3-8, fairly subsumed in that issue is the question of whether res judicata should equitably apply on the facts presented here. Petitioner has adequately preserved, for review by this Court, the issue of equitable exceptions to res judicata in Title VII cases.

3. The remainder of Respondent's submissions, see Op. Cert. 18-26, attempt to disparage the worthiness of this Petition for this Court's attention. Glaringly omitted from

Respondent's discussion is the obvious impact that a decision by this Court on this Petition would have in resolving a signal and difficult procedural issue in many Title VII cases. As Petitioner has already observed, see Pet. 22-23, he is not seeking a sweeping set of equitable or other exceptions to the standard set of presumptions regarding claim-splitting or other situations involving the typical application of res judicata principles. But where, as here (and Respondent does not appear to deny it), it is the *employer's* litigation conduct in a case (such as taking a questionable position as to sovereign immunity and litigating it to the highest court in the land) that results in an employee having to split his or her claims in separate proceedings, such an exception is surely justified.

Just as significant, Respondent persists in taking the position that a mere "decision on the merits" qualifies to trigger res judicata. See Op. Cert. 4, 18 ("In order for res judicata to apply . . . there must have been a decision on the merits as to some issue."), 23, 26. What Respondent clearly illides is this Court's requirement of a *final judgment* in a case. See *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Respondent implies that the "federal lawsuit" on which there had been a "decision on the merits," only includes the federal claims to which Petitioner could have possibly moved to add his federal Title VII cause of action. Respondent ignores the fact that Lapides's original lawsuit, filed in state court and removed to federal court by Respondent, included both state and federal claims, and there is no legal support for its implied position that a ruling on the merits of the federal claims splits the lawsuit such that future federal claims are precluded by res judicata, but state claims are not.

Far from succeeding in raising concerns as to the cert-worthiness of the issues raised in this Petition, Respondent – by the positions they expressly and impliedly take – actually reinforces the need for this Court's plenary review. In the thousands of Title VII cases filed each year in both federal and state court, claim-splitting and res judicata problems arise in a substantial minority of filings. It is incumbent on this Court, in the wise exercise of its discretion for review, to resolve these questions.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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